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*California, Laws, 1873-4*

AMENDMENTS

TO THE

CODES OF CALIFORNIA.

Passed at the Twentieth Session of the Legislature 1873-4.

WITH FULL NOTES OF THE DECISIONS OF THE SUPREME COURT  
FROM VOLUMES 41 TO 45,  
INCLUSIVE,

BEING A SUPPLEMENT TO THE ANNOTATED EDITION OF THE CODES.

SAN FRANCISCO:  
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# LIST OF SECTIONS ADDED AND AMENDED, 1873-4.

## CODE OF CIVIL PROCEDURE.

The following sections were amended or added to the Code of Civil Procedure by the Commissioners' Bill, approved March 24, to take effect July 1st, 1874, being Chapter 383 of Laws of 1873-4 :

§§ 9, 11, 17, 26, 43, 76, 85, 97, 117, N. S. 119, 125, 152, 161, N. S. 188, 200, N. S. 202, 204, 214, 215, 217, 226, 227, 269 (276 repealed by Act March 30), 284, 287, 296, 299, 317, 336, 337, 339, 340, 341, N. S. 348, 370, 372, 376, 377, 380, 381, 385, 387, 405, 406, 409, 410, 411, 413, 416, 437, 440, N. S. 442, 443, 448, 465, 469, 473, N. S. 476, 479, 481, 482, 494, 503, 537, 538 (539 repealed by subsequent Act), 555, 556, 592, 601, 602, 627, 631, 632, 635, 646, 650, 651, 653, 659, 660, 661, N. S. 662, 663, 670, 671, 675, 684, 691, 692, 695, 696, 703, 755, 764, 787, 796, N. S. 810, 813, 814, 816, 817, 818, 819, 820, 821, 822, 823, 824, 826, 832, 843, 845, 848, 862, 893, 911, 924, 940, 942, 946, 948, 950, 951, 952, 953, 957, 966, 969, 971, 997, 1000, 1012, 1013, 1033, 1054, N. S. 1059, 1067, 1084, 1094, 1097, 1108, 1161, 1162, 1164, 1166, 1167, 1171, 1174, N. S. 1179, 1185, 1197, 1204, 1205, 1206, 1238, 1239, 1244, 1300, 1304, 1306, 1307, 1328, 1333, 1340, 1384, 1394, 1396, N. S. 1407, 1460, 1468, 1474, 1475, 1476, 1478, 1493, 1494, 1496, 1500, N. S. 1513, 1516, 1518, 1519, 1523, 1525, 1526, 1536, 1537, 1539, 1561, 1601, 1634, 1637, 1639, 1640, 1668, 1698, 1704, 1718, 1719, N. S. 1722, 1737, 1747, N. S. 1766, 1798, 1828, 1829, 1830, 1833, 1848, 1851, 1855, 1880, 1893, 1901, 1906, 1908, 1918, 1920, 1923, 1924, 1926, 1931, 1932, 1936, 1940, 1944, 1946, 1948, 1950, N. S. 1951, 1969, 1970, 2011, 2013, 2014, 2024, 2077, 2084, 2085, 2086, 2087, 2088, 2094, 2101 N. S. 2104.

The following sections were repealed by the same Act:

§§ 162, 521, 798, 1479, 1480, 1481, 1482, 1583, 1484, 1546, 1559, 1949.

The following sections were amended or added to the Code of Civil Procedure by distinct Bills, forming distinct chapters of the Laws of 1873-4, as stated in the column on the left of the page :

Number of Section.	Date of Approval.	When in Effect.	Chapter of Laws.
Sec. 50.....	March 30 .....	Immediately.....	675 .....
Sec. 115.....	February 28.....	Immediately.....	150 .....
Sec. 270.....	March 30.....	July 1.....	591 .....
Sec. 271.....	March 30.....	July 1.....	591 .....
N. S. 272.....	March 30.....	July 1.....	591 .....
N. S. 273.....	March 30.....	July 1.....	591 .....
N. S. 274.....	March 30.....	July 1.....	591 .....
Sec. 276.....	March 18.....	Sixty days.....	306 .....
Sec. 276.....	March 30.....	Sixty days.....	587 .....

Number of Section.	Date of Approval.	When in Effect.	Chapter of Laws.
Sec. 529.....	March 30.....	Immediately.....	624.....
Sec. 539.....	March 30.....	Immediately.....	636.....
Sec. 845. ....	March 28.....	Sixty days.....	523.....
Sec. 849.....	March 28.....	Sixty days.....	523.....
Sec. 949.....	February 16.....	Immediately.....	90.....
Sec. 1183. ..	March 30.....	Sixty days.....	586.....
Sec. 1187.....	March 30.....	Sixty days.....	586.....
N. S. 1192.....	March 30.....	Sixty days.....	586.....
N. S. 1193.....	March 30.....	Sixty days.....	586.....
Sec. 1194.....	March 30.....	Sixty days.....	586.....
Sec. 1195.....	March 30.....	Sixty days.....	586.....
N. S. 1196.....	March 30.....	Sixty days.....	586.....
N. S. 1279.....	March 13.....	Sixty days.....	246.....
Sec. 1505.....	March 28.....	Immediately.....	521.....
Sec. 1616.....	March 24.....	Immediately.....	396.....
Sec. 1618.....	March 24.....	Immediately.....	396.....

## POLITICAL CODE.

The following table shows the sections amended and added to the Political Code, with the date of approval, the time at which they take effect, and the chapter of the laws of 1873-4 by which they were amended. Chapter 610 was the Commissioners Bill, which takes effect the first Monday of July (July 6th), and with reference to other Acts of this Session is to be construed as if it had passed on the first day of the Session.

Section,	Approved.	Effect.	Chapter of Laws.	Section,	Approved.	Effect.	Chapter of Laws.
9.....	March 13.....	July 6.....	610	777.....	March 24.....	Immedi'ly..	393
11.....	March 13.....	July 6.....	610	778.....	March 24.....	Immedi'ly..	393
17.....	March 13.....	July 6.....	610	779.....	March 24.....	Immedi'ly..	393
162.....	February 4..	Immedi'ly..	61	780 ..	March 24 ..	Immedi'ly..	393
194.....	March 13 ..	July 6.....	610	781.....	March 24.....	Immedi'ly..	393
236... ..	March 13.....	July 6.....	610	781.....	March 13.....	July 6.....	610
274.....	March 13 .....	July 6.....	610	782N.S..	March 24.....	Immedi'ly..	393
301.....	March 13.....	July 6.....	610	791.....	March 13.....	July 6.....	610
334.....	March 13.....	July 6.....	610	795.....	March 13.....	July 6.....	610
335.....	March 13.....	July 6.....	610	798.....	March 16... ..	Immedi'ly..	276
337 N.S	March 13.....	July 6.....	610	843 N.S.	March 13.....	July 6 .....	610
437... ..	March 13.....	July 6 .....	610	926.....	March 13.....	July 6 .....	610
443 N.S.	March 13.....	Immedi'ly..	263	955 .....	March 30.....	Sixty days..	590
595 .....	March 13.....	July 6 .....	610	986.....	March 27.....	July 6.....	489
596.....	March 13.....	July 6.....	610	1032.....	March 13 .....	July 6 .....	610
596 .....	March 30 .....	Sixty days..	621	1097.....	March 13 .....	July 6.....	610
602.....	March 13.....	July 6.....	610	1106.. ..	March 13.....	July 6.....	610
602 .....	March 30.....	July 2.....	668	1109.....	March 13.....	July 6.....	610
610 .....	March 13.....	July 6.....	610	1113.....	March 13 .....	July 6 .....	610
611.....	March 13.....	July 6 .....	610	1114.....	March 13 .....	July 6.....	610
616.....	March 28.....	Immedi'ly..	519	1115.....	March 13.....	July 6.....	610
617.....	March 28.....	Immedi'ly..	519	1116.....	March 13.....	July : .....	610
622.....	March 13.....	July 6.....	610	1117.....	March 13.....	July 6.....	610
633 N.S.	March 12 .....	Sixty days..	256	1131.....	March 13 .....	July 6.....	610
656.....	March 30... ..	Immedi'ly..	625	1132.....	March 13.....	July 6.....	610
737.....	March 13.....	July 6.....	610	1142.....	March 13.....	July 6.....	610
777.....	March 13. ....	July 6.....	610	1144 .....	March 13.....	July 6 .....	610

# AMENDED SECTIONS—POLITICAL.

V

Section.	Approved.	Effect.	Chapter of Laws.	Section.	Approved.	Effect.	Chapter. of Laws
1149	March 13	July 6	610	1634	March 28	Immedi'ly	543
1160	March 13	July 6	610	1635	March 28	Immedi'ly	543
1174	March 13	July 6	610	1636	March 28	Immedi'ly	543
1191	March 13	July 6	610	1638	March 28	Immedi'ly	543
1197	March 26	July 6	456	1640 N.S.	March 13	Immedi'ly	263
1198	March 13	July 6	610	1663	March 28	Immedi'ly	543
1227	March 13	July 6	610	1665	March 28	Immedi'ly	543
1239	March 13	July 6	610	1669	March 28	Immedi'ly	543
1253	March 13	July 6	610	1686	March 28	Immedi'ly	543
1254	March 13	July 6	610	1696	March 28	Immedi'ly	543
1255	March 13	July 6	610	1700	March 28	Immedi'ly	543
1261	March 13	July 6	610	1701	March 28	Immedi'ly	543
1262	March 13	July 6	610	1702 N.S.	March 28	Immedi'ly	543
1264	March 13	July 6	610	1712	March 28	Immedi'ly	543
1279 N.S.	March 13	Sixty days	246	1717 N.S.	March 28	Immedi'ly	543
1357	March 26	July 6	456	1744	March 28	Immedi'ly	543
1386	March 13	July 6	610	1746	March 28	Immedi'ly	543
1388	March 13	July 6	610	1747	March 28	Immedi'ly	543
1398	March 13	July 6	610	1748	March 28	Immedi'ly	543
1415	March 13	July 6	610	1749	March 28	Immedi'ly	543
1425	March 13	July 6	610	1750	March 28	Immedi'ly	543
1432	March 13	July 6	610	1751	March 28	Immedi'ly	543
1435	March 13	July 6	610	1752	March 28	Immedi'ly	543
1474	March 13	July 6	610	1753	March 28	Immedi'ly	543
1475	March 13	July 6	610	1770	March 28	Immedi'ly	543
1489	March 30	Immedi'ly	620	1772	March 28	Immedi'ly	543
1494	March 30	Immedi'ly	620	1773	March 28	Immedi'ly	543
1496	March 30	Immedi'ly	620	1775	March 28	Immedi'ly	543
1497	March 30	Immedi'ly	620	1777	March 28	Immedi'ly	543
1503	March 30	Immedi'ly	620	1790	March 28	Immedi'ly	543
1504	March 30	Immedi'ly	620	1791	March 28	Immedi'ly	543
1505	March 30	Immedi'ly	620	1792	March 28	Immedi'ly	543
1507	March 30	Immedi'ly	620	1817 N.S.	March 28	Immedi'ly	543
1521	March 13	Immedi'ly	263	1818	March 28	Immedi'ly	543
1532	March 28	Immedi'ly	543	1838	March 28	Immedi'ly	543
1533 N.S.	March 13	Immedi'ly	263	1842	March 28	Immedi'ly	543
1543	March 28	Immedi'ly	543	1842	March 13	Immedi'ly	263
1544	March 28	Immedi'ly	543	1845 N.S.	March 28	Immedi'ly	543
1548	March 28	Immedi'ly	543	1846 N.S.	March 28	Immedi'ly	543
1549	March 28	Immedi'ly	543	1847 N.S.	March 28	Immedi'ly	543
1551 N.S.	March 28	Immedi'ly	543	1848 N.S.	March 28	Immedi'ly	543
1551 N.S.	March 13	Immedi'ly	263	1849 N.S.	March 28	Immedi'ly	543
1552 N.S.	March 28	Immedi'ly	543	1850 N.S.	March 28	Immedi'ly	543
1552 N.S.	March 13	Immedi'ly	263	1851 N.S.	March 28	Immedi'ly	543
1560	March 28	Immedi'ly	543	1852 N.S.	March 28	Immedi'ly	543
1561	March 28	Immedi'ly	543	1858	March 28	Immedi'ly	549
1564	March 28	Immedi'ly	543	1858	March 13	Immedi'ly	263
1577	March 28	Immedi'ly	543	1859	March 28	Immedi'ly	543
1578	March 28	Immedi'ly	543	1867 N.S.	March 28	Immedi'ly	543
1579	March 28	Immedi'ly	543	1868 N.S.	March 28	Immedi'ly	543
1593	March 13	Immedi'ly	263	1869 N.S.	March 28	Immedi'ly	543
1595	March 28	Immedi'ly	543	1870 N.S.	March 13	Immedi'ly	263
1599	March 28	Immedi'ly	543	1871	March 28	Immedi'ly	543
1600	March 28	Immedi'ly	543	1874	March 28	Immedi'ly	543
1602	March 28	Immedi'ly	543	1935	March 13	July 6	610
1611 N.S.	March 28	Immedi'ly	543	1936	March 13	July 6	610
1612 N.S.	March 28	Immedi'ly	543	2240	March 18	Immedi'ly	330
1617	March 13	Immedi'ly	263	2255	March 13	July 6	610
1620	March 28	Immedi'ly	543	2295	March 13	July 6	610
1621	March 28	Immedi'ly	543	2300	March 13	July 6	610
1623	March 28	Immedi'ly	543	2619	March 30	Sixty days	617

Section.	Approved.	Effect.	Chapter of Laws.	Section,	Approved.	Effect.	Chapter of Laws.
2620	March 30	Sixty days	617	3457	March 14	July 6	610
2631	March 30	Sixty days	617	3459	March 13	July 6	610
2647	March 30	Sixty days	617	3461	March 13	July 6	610
2648	March 30	Sixty days	617	3462	March 13	July 6	610
2649	March 30	Sixty days	617	3464	March 13	July 6	610
2650	March 30	Sixty days	617	3466	March 13	July 6	610
2653	March 30	Sixty days	617	3475	March 13	July 6	610
2654 N.S.	March 13	July 6	610	3476	March 13	July 6	610
2657	March 30	Sixty days	617	3477	March 13	July 6	610
2658	March 30	Sixty days	617	3482	March 16	Immedi'ly	277
2659	March 30	Sixty days	617	3489 N.S.	March 13	July 6	610
2660	March 30	Sixty days	617	3490 N.S.	March 13	July 6	610
2661	March 30	Sixty days	617	3503 N.S.	March 13	July 6	610
2762	March 30	Sixty days	617	3514	March 13	July 6	610
2664	March 30	Sixty days	617	3518	March 13	July 6	610
2685	March 30	Sixty days	617	3574	March 30	July 6	610
2687	March 30	Sixty days	617	3617	March 30	Immedi'ly	613
2688	March 30	Sixty days	617	3630	March 24	Immedi'ly	392
2698	March 30	Sixty days	617	3632	March 24	Immedi'ly	392
2704	March 30	Sixty days	617	3651	March 24	Immedi'ly	392
2706	March 30	Sixty days	617	3663	March 30	Sixty days	662
2707	March 30	Sixty days	617	3680	March 30	Sixty days	662
2708	March 30	Sixty days	617	3693	March 24	Immedi'ly	392
2714	March 30	Sixty days	617	3696	March 24	Immedi'ly	392
2724	March 30	Sixty days	617	3696	March 30	Immedi'ly	643
2725	March 30	Immedi'ly	664	3713	March 30	Immedi'ly	643
2726	March 30	Sixty days	617	3717	March 30	Sixty days	662
2729	March 30	Sixty days	617	3719	March 13	Immedi'ly	263
2731	March 30	Sixty days	617	3730	March 24	Immedi'ly	392
2732	March 30	Sixty days	617	3732	March 24	Immedi'ly	392
2743	March 30	Sixty days	617	3737 N.S.	March 24	Immedi'ly	392
2746	March 30	Sixty days	617	3738 N.S.	March 24	Immedi'ly	392
2747	March 30	Sixty days	617	3773	March 24	Immedi'ly	392
2754	March 30	Sixty days	617	3780	March 24	Immedi'ly	392
2755	March 30	Sixty days	617	3781	March 24	Immedi'ly	392
2832 N.S.	March 30	Immedi'ly	589	3785	March 24	Immedi'ly	392
2950	March 13	July 6	610	3788	March 13	July 6	610
2952	March 13	July 6	610	3789	March 24	Immedi'ly	392
2953	Repealed by Chap. 610. See N.S. 2952.			3811 N.S.	March 24	Immedi'ly	392
2954	March 13	July 6	610	3812 N.S.	March 24	Immedi'ly	392
2958	March 7	Immedi'ly	201	3813 N.S.	March 24	Immedi'ly	392
2961	March 13	July 6	610	3814 N.S.	March 24	Immedi'ly	392
3009	March 23	Immedi'ly	364	3815 N.S.	March 24	Immedi'ly	392
3010	March 23	Immedi'ly	364	3816 N.S.	March 24	Immedi'ly	392
3076	March 13	July 6	610	3820	March 24	Immedi'ly	392
3136	March 13	July 6	610	3823	March 24	Immedi'ly	392
3172	March 13	July 6	610	3829	March 24	Immedi'ly	392
3292	March 30	Immedi'ly	635	3839	March 30	Immedi'ly	679
3341	March 13	July 6	610	3840	March 30	Immedi'ly	679
3364	March 24	Immedi'ly	408	3841	March 30	Immedi'ly	679
3364	March 13	July 6	610	3843	March 30	Immedi'ly	679
3380	March 13	July 6	610	3845	March 30	Immedi'ly	679
3382	March 10	Immedi'ly	223	3846	March 30	Immedi'ly	679
3441	March 28	Immedi'ly	526	3847	March 30	Immedi'ly	679
3443	March 28	Immedi'ly	526	3854	March 30	Immedi'ly	679
3445	March 28	Immedi'ly	526	3857	March 30	Immedi'ly	679
3446	March 13	July 6	610	3858	March 30	Immedi'ly	679
3449	March 13	July 6	610	3860	March 30	Immedi'ly	679
3451	March 13	July 6	610	3862	March 30	Immedi'ly	679
3452	March 13	July 6	610	3866	March 30	Immedi'ly	644
3456	March 13	July 6	610	3897 N.S.	March 24	Immedi'ly	392



Section.	Approved.	Effect.	Chapter of Laws.	Section.	Approved.	Effect.	Chapter of Laws.
3898 N.S.	March 24.....	Immedi'ly..	392	4047 N.S.	March 18.....	Immedi'ly..	317
3899 N.S.	March 24.....	Immedi'ly..	392	4079.....	March 13.....	July 6....	610
3900 N.S.	March 24.....	Immedi'ly..	392	4109.....	Dec. 22.....	Immedi'ly..	8
3921.....	March 16.....	Immedi'ly..	284	4120.....	March 3.....	Immedi'ly..	165
3922.....	March 7.....	Immedi'ly..	202	4122.....	March 13.....	July 6.....	610
3953.....	March 30.....	Sixty days..	672	4178.....	March 13.....	July 6.....	610
3973.....	March 13.....	July 6.....	610	4345 N.S.	February 28....	Immedi'ly..	159
3777.....	March 13.....	July 6.....	610	4346 N.S.	February 28....	Immedi'ly..	159
3977.....	March 30.....	Immedi'ly..	593	4347.....	February 28....	Immedi'ly..	159
3978.....	March 13.....	July 6.....	610	4369.....	March 13.....	July 6.....	610
3981.....	March 13.....	July 6.....	610	4370.....	March 13.....	July 6.....	610
3985.....	March 13.....	July 6.....	610	4374.....	March 13.....	July 6.....	610
3985.....	March 30.....	Immedi'ly..	593	4386.....	March 13.....	July 6.....	610
4001.....	March 24.....	Immedi'ly..	410	4457 N.S.	March 13.....	July 6.....	610
4047 N.S.	March 13.....	July 6.....	610				

The following sections of the Political Code were repealed:

Sec. 1161, in effect July 6; 1493, 1498, 1499 and 1500, in effect May 30; 1547, 1618, 1776, in effect March 28; 1542, 1756, 1845, 1846, 1847, 1848, in effect March 13; 2645, 2646, 2651, 2652, 2686, in effect April 29; 2953, in effect April 6; 2955, 2967, in effect July 6; 3399, 3400, 3401, 3402, 3403, 3419, in effect January 19; 3418, 3419, 3420, 3421, in effect March 28; 3757, in effect December 23; 3801, 3859, in effect March 30; 4358 to 4365 inclusive, in effect March 28.

## PENAL CODE.

The following sections were amended or added to the Penal Code by the Commissioners' Bill, approved March 30th, to take effect July 1st, 1874, being Chapter 614 of Laws of 1873-4:

§§ 7, 26, 43, 52, 65, 70, 95, 96, 116, 137, 138, 177, 182, N. S. 185, 189, 203, 212, 227, 228, 243, 245, 248, 266, 311, 316, N. S. 317, 348, 349, 370, 371, 379, 381, N. S. 400, 481, 482, 602, N.S. 654, 675, N.S. 678, 844, 896, 897, 903, 954, 967, 969, 971, 972, 985, 1025, 1028, 1029, 1048, 1052, 1070, 1073, 1074, 1076, 1078, 1083, 1093, 1131, 1138, 1151, 1158, N. S. 1167, 1170, 1171, 1174, 1180, 1191, 1207, 1243, 1288, N. S. 1289, 1322, 1323, 1357, 1368, 1370, 1429, 1445, 1449, 1473, 1570.

The following sections were REPEALED by the same bill: §§ 151, 152, 582, 1079, 1080, 1084, 1085.

All provisions of laws inconsistent with the provisions of this Act are repealed, except as to offenses committed before this Act takes effect, and to such offenses, and for the punishment of parties guilty thereof, the repealed provisions shall continue in force.

This Act shall take effect on the first day of July, 1874.

The following sections were amended or added to the Penal Code by distinct bills, forming distinct chapters of the laws of 1873-4, as designated in the column on the left of the page:

Number of Section.	Date of Approval.	When in effect.	Chapter of Laws.
Sec. 17.....	March 7.....	Sixty days.....	196.....
N. S. 62.....	March 23.....	Sixty days.....	379.....
N. S. 89.....	March 30.....	Immediately.....	673.....
Sec. 190.....	March 28.....	Immediately.....	508.....
Sec. 297.....	March 30.....	Immediately.....	657.....
Sec. 306.....	March 10.....	Sixty days.....	221.....
Sec. 306.....	March 30.....	Sixty days.....	628.....

Repealing Act of March 10th.

Number of Section.	Date of Approval.	When in effect.	Chapter of Laws.
Sec. 307.....	March 10.....	Sixty days.....	221 .....
Sec. 307.....	March 30.....	Sixty days.....	628 .....
Sec. 336.....	March 24.....	Sixty days.....	409 .....
Sec. 397.....	March 26.....	Immediately.....	438 .....
N. S. 400.....	February 4.....	Sixty days.....	55 .....
Sec. 466.....	March 3.....	Immediately.....	178 .....
Sec. 496.....	February 28 .....	Immediately.....	151 .....
Sec. 632.....	March 18.....	Immediately.....	305 .....
Sec. 634.....	March 30.....	Immediately.....	651 .....
Sec. 795.....	March 7.....	Sixty days.....	229 .....
Sec. 1205....	March 7.....	Sixty days.....	196 .....
Sec. 1446....	March 7.....	Sixty days.....	196 .....
N. S. 1587....	February 24 .....	Sixty days.....	125 .....

## CIVIL CODE.

The following sections were amended or added to the Civil Code by the Commissioners' Bill, approved March 30, to take effect July 1, 1874, being Chapter 612 of the Laws of 1873-4:

§ § 14, 19, 33, 34, 35, 36, 38, 39, 47, 50, 58, 61, 62, 69, 72, 73, 76, 82, 83, 90, 91, 92, 100, 102, 118, 119, 123, 124, 130, 146, 147, 148, 159, 166, 167, 174, 175, 176, 194, 197, 212, N. S. 215, 222, 223, 228, 241, 243, 246, 249, 255, 284, 285, 286, 287, 290, 292, 296, 297, 301, 303, 304, 306, 307, 313, 316, 322, 326, 331, 336, 348, 359, 360, 388, 393, 401, 427, 428, 441, 444, 447, 491, 498, 505, 506, 507, 510, 512, 514, 521, 549, 598, 639, 670, 671, 710, 755, 762, 766, 770, 774, 775, 802, 822, N. S. 827, 830, 832, 853, 857, 858, 860, 867, 869, 953, 960, 991, 1013, 1019, 1053, 1110, 1112, 1114, 1151, 1161, 1170, 1183, 1188, 1199, N. S. 1207, 1237, 1238, 1239, 1241, 1257, 1261, 1262, 1263, 1265, 1273, 1283, 1285, 1289, 1312, 1332, 1333, 1343, 1358, 1359, 1360, 1367, 1376, 1384, 1386, 1401, 1428, 1479, 1488, 1512, 1521, 1524, 1533, 1542, 1624, 1697, 1698, 1731, 1739, 1741, 1774, 1798, 1840, 1914, 1915, 1917, 1920, 1941, 1942, 1949, 1981, 1984, 1988, 2079, 2120, 2121, 2161, 2162, 2468, 2172, 2174, 2176, N. S. 2177, 2183, 2196, 2200, N. S. 2204, 2375, 2377, N. S. 2385, 2462, 2466, 2467, 2468, 2469, 2470, N. S. 2558, N. S. 2583, 2605, 2609, 2617, 2618, 2629, 2633, 2642, 2681, 2683, 2707, 2711, 2712, 2745, 2773, 2839, 2913, 2924, 2930, 2934, 2935, 2941, 2952, 3001, 3009, 3100, N. S. 3116, 3131, 3176, 3186, 3199, 3300, 3336, 3356, 3380, 3384, 3423, 3457, 3479, 3480.

And the following sections were REPEALED by the same bill :

§ § 15, 16, 17, 28, 30, 31, 299, 402, 541, 646, 648, 848, 849, 850, 851, 854, 855, 861, 862, 868, 878 to 946 inclusive, 947, 1060, 1163, 1271, 1284, 1286, 1294, 1385, 1513, 1658, 1669, 1672, 1732, 2065, 2122, 2710, 2752, 2937, 2949, 2951, 3121, 3165, 3262, 3385, 3393, 3453, 3454, 3455, 3456.

For repealing clause, construction, etc., see provisions following section 3932.

The following sections were amended or added to the Civil Code by distinct bills,

No. of Section.	Date of Approval.	Takes effect.	Chapter of Laws.
419.....	March 30.....	Sixty days ..	623
449 .....	March 30.....	Sixty days. ....	623
450 N. S. ....	March 30.....	Sixty days.....	623
451 N. S. ....	March 30.....	Sixty days. .	623
514.....	March 28.....	Sixty days.....	524
574.....	March 18.....	Immediately.....	318
1165 N. S.....	March 11.....	Sixty days... ..	244
1275.....	Jan'y 29.....	Sixty days.....	43
1313.....	March 18.....	Immediately. ....	304

**AMENDMENTS**

**TO THE**

**CODE OF CIVIL PROCEDURE,**

**ENACTED AT THE TWENTIETH LEGISLATIVE  
SESSION, 1873-4.**

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**UNLESS OTHERWISE STATED AT THE CLOSE OF THE SECTION, THESE  
AMENDMENTS TAKE EFFECT JULY 1st, 1874.**

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**3. Caulfield v. Doe, 45 Cal. 222.**

**8. When on pending actions proceedings have been taken prior to the taking effect of the Code, their sufficiency must be determined by the laws in force at the time. Caulfield v. Doe, 45 Cal. 223.**

**9. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code.**

**Limitations  
shall con-  
tinue to  
run.**





**Holidays.**

11. If the first day of January, the twenty-second day of February, the fourth day of July, or the twenty-fifth day of December, falls upon a Sunday, the Monday following is a holiday.

**Terms defined.**

17. Words used in this Code in the present tense include the future as well as the present ; words used in the masculine gender include the feminine and neuter ; the singular number includes the plural, and the plural the singular ; the word person includes a corporation as well as a natural person ; writing includes printing ; oath includes affirmation or declaration, and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose ;" signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness.

The following words also have in this Code the signification attached to them in this section, unless otherwise apparent from the context:

**Property defined.**

1. The word "property" includes both real and personal property;

**Real property.**

2. The words "real property" are co-extensive with lands, tenements and hereditaments ;

**Personal property.**

3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt;

**Month.**

4. The word "month" means a calendar month, unless otherwise expressed ;

**Will.**

5. The word "will" includes codicils ;

**Writ.**

6. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a Court or judicial officer, and the word "process" a writ or summons issued in the course of judicial proceedings.

**State.**

7. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories ; and the words "United States" may include the District and Territories.

**26.** An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from:

Obligation defined.

1. Contract ; or
2. Operation of law.

**33.** Power of Judiciary to declare statute unconstitutional. *S. & V. R. R. Co. v. Stockton*, 41 Cal. 148. Power of Courts over public officers. *Porter v. Haight*, 45 Cal. 631. Duty of Court to vacate order inadvertently made. *Hall v. Polack*, 42 Cal. 218. The form and mode of service of process to acquire jurisdiction are matters of legislative discretion. *McCauley v. Fulton*, 44 Cal. 356. Admiralty State Courts have concurrent jurisdiction of causes of action cognizable in Admiralty where only a common law remedy is sought. *Bohannon v. Hammond*, 42 Cal. 227.

**43.** The Supreme Court has also power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction.

Original jurisdiction.

**44.** It has no jurisdiction on appeal from an order made after final judgment, unless such order followed the judgment, not merely in time but also in logical sequence. *Calderwood v. Peyser*, 42 Cal. 110, overruling *Curvey v. Gambert*, 32 Cal. 305. Appeal in special cases the creature of statutory enactment; per WALLACE, J. Appeal of Houghton, 42 Cal. 35. Special cases not cases at law. *Id.* Not included in "cases," as used in the Constitution. *Id.*

(Subd. 3.) No appellate jurisdiction in cases at law, where the demand, exclusive of interest, is less than three hundred dollars. *Sweet v. Tice*, 45 Cal. 71.

(Subd. 4.) It has appellate jurisdiction from judgments of District Courts rendered on awards. *Fairchild v. Doten*, 42 Cal. 125.

**50.** The April and October terms of this Court shall be held at the capital of the State. If proper rooms in which to hold the Court, and for the accommodation of the officers thereof, are not provided by the State, together with attendants, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of business, the Court may direct the Sheriff of the county in which it is held to provide such rooms, attendants, furniture, fuel, lights, and stationery, and the expenses thereof, certified by a majority of the Justices to be correct, must be paid out of the

Terms of Supreme court, where held







State Treasury. The January and July terms of this Court may be held at the city and county of San Francisco, provided the Board of Supervisors thereof, at the discretion of said Board, shall procure and maintain, at the expense of said city and county, rooms and furniture acceptable to the Justices of said Court for the accommodation of the business thereof, and of its respective officers, together with necessary attendants, fuel, and lights; and the Board of Supervisors of said city and county are hereby authorized to appropriate all necessary funds to defray the expenses aforesaid, payable out of the general fund of said city and county. If the said Board of Supervisors shall accept the provisions of this act, and procure the necessary rooms and furniture at said city and county for the accommodation of said Court and its officers, then it shall be the duty of said Board to permanently maintain such rooms and furniture, together with the necessary attendants, fuel, and lights; and upon the failure of said Board so to do, after having accepted the provisions of this act as aforesaid, the Court may direct the Sheriff of said city and county to provide such rooms, furniture, fuel, and lights; and the expenses thereof, certified by a majority of the Justices to be correct, shall be a charge against said city and county, and must be paid out of the general fund thereof. Until such time as the Board of Supervisors of said city and county shall accept the provisions of this act, the January and July terms of this Court shall continue to be held at the capital of the State; provided, that in no event shall the State hereafter be put to any additional expense of any kind, character, or nature, by reason of the holding of any term or terms of said Court, at said city and county of San Francisco. (In effect March 30, 1874.)

57. District Courts have jurisdiction of an action commenced under the act of March 14th, 1853, to prevent extortion in office and enforce official duty. *Matter of Marks*, 45 Cal. 199. District Courts have jurisdiction of actions against the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator. *Bush v. Lindsey*, 44 Cal. 121.

(Subd. 5.) Requisites of affidavit for certiorari from Supreme Court. *Edwards v. Ryan*, 45 Cal. 243.

76. Each term must be held for such period as in the opinion of the Court may be necessary for the transaction of business, having due regard to the business pending in the Court in other counties of the district. For the purpose of hearing and determining actions in equity, and special proceedings of a civil nature, motions for new trials, motions for and to dissolve or modify injunctions, motions to set aside or vacate orders of arrest and writs of attachment, and for the entry of orders and judgments, this Court is always open.

Duration of terms.

77. The act of April 20th, 1863, was intended to prevent the loss of a term, and it does not apply after the Judge has once appeared and commenced to hold Court. *People v. Ah Ying*, 42 Cal. 18. Under the act of March 1st, 1864, a District Judge may adjourn a general term of his Court in one county over an intervening term in another county. The term so adjourned is a continuation of the regular term. *People v. Ah Ying*, 42 Cal. 18. Or to adjourn any general term in one county within their districts to a day certain within the time prescribed for the commencement of the next term in the same county; *provided*, such special term shall not interfere with any general term in such district. *Talbert v. Hopper*, 42 Cal. 397. The legality of sessions of District Court presumed. *Id.*

82. County Courts are of superior jurisdiction, and have power to grant new trials. *Yewawine v. Richter*, 43 Cal. 313.

85. Its original jurisdiction extends:

1. To actions to prevent or abate a nuisance;
2. To actions of forcible entry and detainer;
3. To proceedings in insolvency;
4. To all special cases or proceedings in which the law, giving the remedy or authorizing the proceedings, confers the jurisdiction upon it;

Original jurisdiction  
—County courts.





5. To the issuance of writs of *habeas corpus*, and all writs necessary to the exercise of its powers ;

6. To inquire, by the intervention of a Grand Jury, of all public offenses committed or triable in the county; and except in the city and county of San Francisco;

7. To the trial of all indictments, except for treason, misprision of treason, murder and manslaughter.

(Subd. 4.) The Constitution has left to the legislative will to determine whether jurisdiction over any given special case shall be vested in the County Court, or some other Court. County Courts have jurisdiction of unlawful detainer against tenants holding over. *Johnson v. Cheley*, 43 Cal. 300.

(Subd. 5.) Original jurisdiction of County Courts in issuance of writs. *People v. Kern Co.*, 45 Cal. 679.

Jurisdiction,  
Probate  
court.

97. The Probate Court has jurisdiction:

1. To open and receive proof of last wills and testaments, and to admit them to probate;

2. To grant letters testamentary, of administration, and of guardianship, and to revoke the same;

3. To appoint appraisers of estates of deceased persons ;

4. To compel executors, administrators, and guardians to render accounts;

5. To order the sale of property of estates, or belonging to minors;

6. To order the payment of debts due from estates;

7. To order and regulate all distributions and partitions of property or estates of deceased persons;

8. To compel the attendance of witnesses, and the production of title deeds, papers, and other property of an estate, or of a minor;

9. To exercise the powers conferred by Title XI, Part III, of this Code;

10. To make such orders as may be necessary to the exercise of the powers conferred upon it.

A Probate Court has no authority on the petition of an executor to order him, on the receipt of money loaned, to reconvey real estate. *Anderson v. Fisk*, 41 Cal. 308. Whether the Probate Court has jurisdiction to specifically enforce the performance of a contract not decided. *Treat v. De Celis*, 41 Cal. 202.

**115.** The jurisdiction conferred by the last section shall not extend, however : Civil jurisdiction restricted.

1. To a civil action in which the title or possession of real property is put in issue ;

2. Nor to an action or proceeding against ships, vessels, or boats, when the suit or proceeding is for the recovery of seamen's wages for a voyage, performed in whole or in part without the waters of this State. (In effect February 28th, 1874.)

**117.** These courts also have jurisdiction of the following public offenses committed within the respective townships or cities in which such courts are established : Criminal jurisdiction, Justices' courts.

1. Petit larceny ;

2. Assault and battery, or either, not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony ;

3. Breaches of the peace, riots, affrays, committing a willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

**119.** (N. S.) Nothing in this Code shall be construed to affect the provisions of an act entitled "An act to organize and regulate the Justices' Court in the city and county of San Francisco," approved March twenty-sixth, eighteen hundred and sixty-six, or of any act amending or supplementing said act ; but the said act and all acts amendatory thereof, or supplementary thereto, are continued in force. Justices' courts of San Francisco.

**121.** The Police Court of San Francisco is not of inferior jurisdiction in the sense that upon mere collateral inquiry nothing is to be intended in support of its judgment. *Ex parte Murray*, 43 Cal. 455.

**125.** In an action for divorce, criminal conversation, seduction or breach of promise of marriage, the Court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the Court, the parties, their witnesses, and counsel. Sittings of court, when may be private.







128. Power of Court to punish for contempt. *Batchelder v. Moore*, 42 Cal. 415. The statute of this State in relation to contempt is a limitation upon the power formerly exercised by Courts to punish for contempt. *Gallaud v. Gallaud*, 44 Cal. 475.

Seal of court, to what proceedings affixed.

152. The seal of the Court need not be affixed to any proceeding therein, or document, except :

1. To a writ;

2. To the certificate of the probate of a will, or of the appointment of an executor, administrator, or guardian;

3. To the authentication of a copy of a record or other proceeding of a Court, or of an officer thereof, or of a copy of a document on file in the office of the clerk.

County and Probate Judges, may hold court in another county.

161. Any County or Probate Judge may hold terms, or portions of terms, of the County or Probate Court, and perform any or all of the duties of County or Probate Judge, in any other county of this State, as well as in that for which he was elected, upon the request of the County or Probate Judge of such county; and when, by reason of sickness or absence from the State, or from any other cause, a County or Probate Court cannot be held in any county, a certificate of that fact must be transmitted by the clerk to the Governor, who may thereupon direct some other County or Probate Judge to hold such Court.

162. Section one hundred and sixty-two of said Code is repealed.

Trial not stayed or discontinued by intervention of another term.

188. (N. S.) The trial or hearing of an action, civil or criminal, in any Court which has commenced, and is in progress, shall not be stayed or discontinued by the arrival of the period fixed by law for another term of such Court, but it shall be lawful for the Court to proceed with the trial or hearing, and bring it to a conclusion, in like manner and with the same effect as if another stated term of the Court had not intervened.

**200.** A person is exempt from liability to act as a juror, if he be: Who exempt from jury duty.

1. A judicial, civil, or military officer of the United States or of the State of California;
2. A person holding a county office;
3. A practicing attorney and counselor at law;
4. A minister of the gospel or a priest of any denomination following his profession;
5. A teacher in a college, academy, or school;
6. A practicing physician or dentist;
7. An officer, keeper, or attendant of an almshouse, hospital, asylum, or other charitable institution;
8. Engaged in the performance of duty as officer or attendant of the county jail or the State prison;
9. Employed on board of a vessel navigating the waters of this State;
10. An express agent, mail carrier, superintendent, employe, or operator of a telegraph line doing a general telegraph business in this State, or keeper of a public ferry or toll-gate;
11. An active member of the Fire Department of any city, town, or village in this State, or an exempt member by reason of five years' active service;
12. A superintendent, engineer, or conductor on a railroad;
13. An editor or local reporter of a newspaper.

**202.** (N. S ) If any person exempt from liability to act as a juror, as provided in section two hundred, be summoned as a juror, he may make and transmit his affidavit to the clerk of the Court for which he is summoned, stating his office, occupation, or employment, and such affidavit shall be delivered by the clerk to the Judge of the Court when the name of such person is called, and, if sufficient in substance, shall be received as an excuse for non-attendance in person. The affidavit shall then be filed by the clerk. Affidavit of claim to exemption.





Jury list by whom and when to be made.

204. The District Judges of the several districts within or embracing part of the city and county of San Francisco, and the County Judge of the county, and the Judge of the Municipal Criminal Court of San Francisco, or a majority of such Judges, must meet in San Francisco in the month of December of each year, at the time and place designated by the County Judge, and make a list of persons to serve as jurors in the courts of record, held in said city and county, for the ensuing year. And the Board of Supervisors of each of the other counties of the State must, at its first regular meeting in each year, or at any other meeting, if neglected at the first, make a list of persons to serve as jurors in the courts of record in their respective counties until a new list is provided.

Jury to be drawn on order of judge.

214. Before the commencement of any term of Court, the Judge thereof, if a jury will be required therefor, must make and file with the County Clerk an order that one be drawn. The number to be drawn must be named in the order; if to form a Grand Jury, it must be twenty-four, and if a Trial Jury, such number as the Judge may direct; and the time must be designated at which the drawing will take place.

Sheriff to be notified.

215. Before the drawing, the clerk must notify the Sheriff and County Judge of the time appointed for such drawing.

Drawing, when to be adjourned.

217. If the officers named do not appear, the clerk must adjourn the drawing till the next day, and, by written notice, require two electors of the county to attend such drawing on the adjourned day.

Courts of Record may order jury drawn, when.

226. Whenever jurors are not drawn and summoned to attend any Court of Record, or a sufficient number of jurors fail to appear, such Court may, in its discretion, order a sufficient number to be forthwith drawn and summoned to attend the Court; or it may, by an order entered on its minutes, direct an elisor elected by

the Court or the Sheriff of the county, forthwith to summon so many good and lawful men of the county, to serve as jurors, as the case may require. And in either case such jurors must be summoned in the manner provided by the preceding section.

Manner of summoning jurors for Courts of Record. *People v. Kelly*, July T., 1873.

227. When there are not competent jurors enough present to form a panel, the Court may direct the Sheriff or an elisor elected by the Court to summon a sufficient number of persons, having the qualification of jurors, to complete the panel, from the body of the county, and not from the bystanders, and the Sheriff or elisor must summon the number so ordered, accordingly, and return the names to the Court.

When and how drawn to complete panel.

241. It is competent for the judge of a Court after the commencement of the session, to order a Grand Jury to be summoned. *People v. Long*, 43 Cal. 445.

269. The Judge of each Court of Record may appoint a competent short-hand reporter, to hold office during the pleasure of the Judge. Such reporter must, at the request of either party, or of the Court, in a civil action or proceeding, and on the order of the Court, the District Attorney, or the counsel for the defendant in a criminal action or proceeding, take down in short-hand all the testimony, the objections made, the rulings of the Court, the exceptions taken, and oral instructions given, and if directed by the Court, or requested by either party, must, within such reasonable time after the trial of such case as the Court may designate, write out the same in plain legible long-hand, and verify and file it with the clerk of the Court in which the case was tried.

Phonographic reporters, appointment and duty.

Construction of statute relative to District Court reporters. *People v. Padillia*, 42 Cal. 535.







Report,  
prima  
facie a  
correct  
statement.

270. The report of the official reporter when appointed and acting in accordance with the provisions of §§ 272 and 273 of this Code, and not otherwise, written out in long hand-writing, and certified as being a correct transcript of the testimony and proceedings in the case, shall be *prima facie* a correct statement of such testimony and proceedings. [In effect July 2, 1874.]

Compensa-  
tion of  
official  
repo. ter.

271. The official reporter shall receive, as compensation for his services in civil proceedings, not exceeding ten dollars per day for taking notes, and not exceeding twenty cents per hundred words for transcription. The short-hand notes so taken shall, immediately after the cause is submitted, be filed with the Clerk; but for the purpose of writing out said notes, the reporter may withdraw the same for a reasonable time. The reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered, and shall be taxed up by the Clerk of the Court as costs against the party against whom judgment is rendered. In case of the failure of a jury to agree, the plaintiff must pay the reporter's fees, for per diem, and for transcription ordered by plaintiff, which have accrued up to the time of the discharge of the jury. In cases where a transcript has been ordered by the Court, the expense thereof must be paid equally by the respective parties to the action, or either of them, in the discretion of the Court; and no verdict or judgment can be entered up, except the Court shall otherwise order, until the reporter's fees are paid, or a sum equivalent thereto deposited with the Clerk of the Court. In no case shall a transcript be paid for, unless ordered either by the plaintiff or defendant, or by the Court, nor shall the reporter be required, in any civil case, to transcribe his notes] until the compensation therefor be tendered him, or deposited in Court for that purpose. The party ordering the reporter to transcribe any portion of the testimony or proceedings, shall pay the fees of the reporter therefor. In criminal cases, when the testimony

has been taken down upon the order of the Court, the compensation of the reporter must be fixed by the Court, and paid out of the treasury of the county in which the case is tried, upon the order of the Court. (In effect July 2, 1874.)

272. (N. S.) No person shall be appointed to or be retained in the position of official reporter of any Court in this State, without being first examined as to his competency by at least three members of the bar practicing in said Court, such members to be designated by the Judge of said Court. The committee so selected shall, upon the request of the Judge of said Court, examine any person as to his qualification whom said Judge may wish to appoint or retain as official reporter, and no person shall be appointed to, or retained in such position, upon whose qualifications said committee shall not have reported favorably. The test of competency before such committee shall be as follows: The party examined must write, in the presence of said committee, at the rate of at least one hundred and forty words per minute for five consecutive minutes, upon matter not previously written by him, and transcribe the same into long-hand writing with accuracy. If he pass said test satisfactorily, the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members of the committee, which certificate shall be filed in the records of the Court. (In effect July 2, 1874.)

Qualifica-  
tions, com-  
petency,  
how tested.

273. (N. S.) The official reporter of any District Court must attend to the duties of his office in person, except when excused for a good and sufficient reason by order of the Court, which order shall be entered upon the minutes of the Court. Employment in his professional capacity elsewhere shall not be deemed a good and sufficient reason for such excuse. When the official reporter of any Court has been excused in the manner provided in this section, the Judge of said Court may appoint an official reporter *pro tem.*, who

Perform-  
ance of  
duties.





shall perform the same duties and receive the same compensation as the official reporter, and whose report shall have the same legal effect as the report of the official reporter. (In effect May 29, 1874.)

Oath of office.

274. (N. S.) The official reporter of any Court, or official reporter *pro tem.*, must, before entering on the duties of his office, take and subscribe the following oath: "I do swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of official reporter (or official reporter *pro tem.*) of the ——— Court, according to the best of my ability." (Approved March 30, 1874, in effect July 1, 1874.)

Qualifications, admissions to practice.

276. Every applicant for admission as attorney and counselor must produce satisfactory testimonials of good moral character, and except as provided in section two hundred and seventy-nine, undergo a strict examination in open Court, as to his qualifications, by the Justices of the Supreme Court.

Personal appearance of applicant essential. *Ex parte Snelling*, 44 Cal. 553.

Qualifications of attorney and counselor.

276. Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character, and undergo a strict examination in open Court as to his qualifications, by the Justices of the Supreme Court; *provided*, that the several County and District Courts of this State may admit applicants to practice as attorneys and counselors in their respective Courts.

[This section was thus amended March 18th; the Commissioners' bill (March 24th) having repealed it, it was re-enacted as above, March 30th, 1874.]

279. Such applicant may be examined as to his qualifications, notwithstanding his admission in the Courts of a sister State, of the Supreme Court of the United States, or of the District of Columbia. *Ex parte Snelling*, 44 Cal. 553.

**282.** Measure of liability for negligence. *Gambert v. Hart*, 44 Cal. 542. Agreement between client and attorney. *Mahoney v. Ber- gin*, 41 Cal. 423. Trust relation between attorney and client. *Porter v. Peckham*, 44 Cal. 204. Employment of attorney, 44 Cal. 204.

**283.** Conduct of Action. Proceedings by whom conducted when there are several defendants, and each appears by his own attorney. *Hobbs v. Duff*, 43 Cal. 487.

Authority of attorney to accept service of notice. *McCreery v. Ever- ding*, 44 Cal. 284. Right of counsel to read law to jury. *People v. Anderson*, 44 Cal. 65. Where counsel appears for certain defendants, his signature to papers after that time, as attorney for defendants, will be construed as limited to those for whom he expressly appeared. *Spangel v. Dellinger*, 42 Cal. 148.

**284.** The attorney in an action or special proceed- Change of  
attorney.  
ing may be changed at any time before judgment or final determination, as follows:

1. Upon his own consent, filed with the clerk, or entered upon the minutes;
2. Upon the order of the Court or Judge thereof, upon the application of the client, after notice to the attorney.

**287.** An attorney and counselor may be removed or Removal  
and sus-  
pension.  
suspended by the Supreme Court, and by the District Courts of the State, for either of the following causes, arising after his admission to practice:

1. His conviction of a felony or misdemeanor in- volving moral turpitude, in which case the record of conviction is conclusive evidence;
2. Willful disobedience or violation of an order of the Court requiring him to do or forbear an act con- nected with or in the course of his profession, and any violation of the oath taken by him, or of his duties as such attorney and counselor;
3. Corruptly and without authority, appearing as attorney for a party to an action or proceeding;
4. Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor.







In all cases where an attorney is removed or suspended by a District Court, the judgment or order of removal or suspension may be reviewed on appeal, by the Supreme Court.

**Answer.**        **296.** If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the Court.

**Judgment.**    **299.** Upon conviction, in cases arising under the first subdivision of § 287, the judgment of the Court must be that the name of the party must be stricken from the roll of attorneys and counselors of the Court, and that he be precluded from practicing as such attorney or counselor in all the Courts of this State; and, upon conviction in cases under the other subdivisions of that section, the judgment of the Court may be according to the gravity of the offense charged—deprivation of the right to practice as attorney or counselor in the Courts of this State, permanently, or for a limited period.

**312. EFFECT OF STATUTE OF LIMITATIONS.**—The expiration of the time fixed by statute with reference to actions for money due on contracts, does not discharge the debt or extinguish the right, but only takes away the remedy. *Sichol v. Carrillo*, 42 Cal. 493.

**STATUTE SUSPENDED BY CONSENT OF MORTGAGOR.**—So long as a mortgagor holds the equity of redemption, and no other rights intervene by reason of subsequent liens or encumbrances, he has the power by written stipulation under the statute, or by absenting himself from the State, to suspend the running of the statute. *Wood v. Goodfellow*, 43 Cal. 185.

But third parties may invoke the aid of the statute, even though as between himself and the mortgagee, the mortgagor may have waived its protection. *Id.*

Where a mortgagor transfers his interest in the mortgaged premises to a third person, the mortgage, as contradistinguished from the mortgage debt, is to be deemed a contract in writing in the sense of the statute on which an action must be brought within four years from the time when an action would lie. *Id.*

**Limitation of actions in case of departure from State.** *Rogers v. Hatch*, 44 Cal. 280. There is no difference in principle between the suspension of the running of the statute resulting from an express waiver and one caused by voluntary act in absenting oneself from the

**State.** *Wood v. Goodfellow*, 43 Cal. 185. Limitations of actions as against estates of deceased. *Sichel v. Carrillo*, 42 Cal. 493.

**CORPORATION DEBTS.**—The statute begins to run when the debt falls due, and the time is not extended as to the right to sue the stockholders by a judgment against the corporation. *Stilphen v. Ware*, 45 Cal. 110.

**COVENANT IN DEED.**—A covenant that the tract conveyed contains a specific quantity of land is a mere chose in action and is broken, if broke at all, as soon as made, and the mere fact that there was no proof till long after it was made by which the breach could be established, might possibly prevent the statute from running; point not decided. *Salmon v. Vallejo*, 41 Cal. 481.

**IMPLIED WARRANTY.**—The statute does not commence to run, upon an implied warranty, until the vendee is disturbed in his possession by the true owner. *Gross v. Kierski*, 41 Cal. 111.

**TRUST.**—If A. conveys land to B. with a provision in the deed that B. shall reconvey to him, B. holds the land in trust for A., and the statute does not commence running on A.'s right to a reconveyance until B. repudiates the trust, and such repudiation is brought to the knowledge of A. *Hearst v. Pijol*, 44 Cal. 230.

**ADVERSE POSSESSION UNDER STATUTE.**—To enable a defendant to avail himself of the statute as a defense, it must appear that he was in the possession of the demanded premises for the period required by the statute to bar plaintiff's right of action. *Raimond v. Eldridge*, 43 Cal. 506. A party in order to acquire title to land by the Statute of Limitations must not only have a possession adverse to the owner but must also claim the title as against the owner during the entire statutory period. *Lovell v. Frost*, 44 Cal. 471. Adverse possession does not ripen into a title unless continued for five years. *Hayes v. Martin*, 45 Cal. 559. Such title distinguished from estoppel under judgment in trespass. *Williams v. Sutton*, 43 Cal. 65. Adverse possession of land, though occupied by mistake, comes fully within the definition of an adverse possession which will set the statute in motion. *Grimm v. Curley*, 43 Cal. 257. If a party in possession of land offers to purchase it from the true owner, and this offer is made, not merely to buy an outstanding or adverse claim in order to quiet his possession, or protect himself from litigation, the offer is a recognition of the owner's title, and will stop the running of the statute.

Where two coterminous proprietors, ignorant of the true boundary between them, fix a line with an agreement that each shall possess to that line till the boundary is ascertained, and the true boundary when ascertained leaves one in possession of the other's land, this possession is not adverse until there is a distinct repudiation of the agreement under which it was taken. *Irvine v. Adler*, 44 Cal. 559.

To constitute an adverse possession, so as to set the statute in motion, the occupation must be open and notorious, under a claim of right; and the person against whom it is held must have knowledge, or the means of knowledge, of such occupation and claim of right. *Thompson v. Pioche*, 44 Cal. 508.





Such possession must be continuous. Where it appeared that the deeds either called for lands different from those sued for, or were void for uncertainty of description, held, that he did not connect himself by means of such deeds with the possession of his grantors. *People v. Klumpke*, 41 Cal. 263. If the possession has been interrupted, even by force or fraud, and the possession be recovered by a peaceable or forcible entry, or by process of law, the continuity is broken, and the statute begins to run only from the time of the re-entry. *San Jose v. Trimble*, 41 Cal. 536.

Limitation  
of action  
on void  
patent.

**317.** When letters patent or grants of real property issued or made by the people of this State are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the people of the State or by any subsequent patentee or grantee of the property, his heirs or assigns, within five years after such determination, but not after that period.

**318. RECOVERY UNDER MEXICAN GRANT.**—An actual adverse possession of five years, subsequent to the passage of the Act of 1863, relative to Spanish and Mexican grants, will, in certain cases, bar a recovery under a title derived from Spain or Mexico, even though the title was not confirmed until after the expiration of the five years. *San Jose v. Trimble*, 41 Cal. 536.

The final confirmation of a Mexican grant so as to set the Statute of Limitations in motion, under the Act of 1855, was the issuance of a patent to the grantee. *Sabichi v. Aguilar*, 43 Cal. 285.

Under the laws of 1863, page 327, the final confirmation which set the statute in motion, was the final confirmation of a survey by the Courts of the United States, provided for in the Act of Congress of June 14th, 1860, or the issuance of a patent. *Id.* The pendency of proceedings for the approval of a survey does not stop the running of the statute in favor of one in the adverse possession. *Hays v. Martin*, 45 Cal. 559.

**UNDER ALCALDE GRANT.**—An adverse possession of five years subsequent to the passage of the Act of April 18th, 1863, amending the Statute of Limitations, will bar a cause of action under an Alcalde grant in San Francisco. *Grimm v. Curley*, 43 Cal. 251.

**ADVERSE POSSESSION OF WATER.**—If the owners of a ditch constructed for conveying water, use the same peaceably, openly and exclusively, under a claim of right, with the knowledge of the owners of the land, for a continuous period of five years, they acquire, by prescription, the right to an easement over the land of the same. *Campbell v. West*, 44 Cal. 646.

**PRESCRIPTION**, or adverse use, cannot mature unto a title against the United States. *Mathews v. Ferrea*, 45 Cal. 51.

**326. POSSESSION OF TENANT.**—The provision that the possession of the tenant shall be deemed the possession of the landlord, does not apply when the tenant acquired another title, five years before the commencement of the action, or has held adversely to the landlord for five years before the commencement of the action. *Lawrence v. Webster*, 44 Cal. 385. If the tenant is in possession of the land under an agreement with his landlord to deliver him possession upon ten days' notice, and the owner of the legal title, without knowledge or notice of the tenancy, after due inquiry, executes a lease to the tenant, the possession of the tenant, after the execution of such lease, is not of such an adverse character, as to keep the statute running in favor of the landlord, and against the owner. *Thompson v. Pioche*, 44 Cal. 508.

**336. Within five years:**

1. An action upon a judgment or decree of any Court of the United States, or of any State within the United States; Within five years.
2. An action for mesne profits of real property.

**337. Within four years:**

An action upon any contract, obligation or liability, founded upon an instrument in writing executed in this State. Within four years.

**PROMISSORY NOTE.**—A promissory note made payable one day after the happening of a particular event, is not due until one day after such event happens, and a suit on it is not barred by the statute, if commenced on the day after such event happens. *Hathaway v. Patterson*, 45 Cal. 294.

**338. (Subd. 1.) OFFICIAL BOND.**—An action upon an official bond is not an action "upon a liability created by statute," and is not therefore barred after the expiration of three years.

**339. Within two years:**

1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the State; Within two years.
2. An action against a Sheriff, Coroner, or Constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape;







3. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

CONTRACTS.—In action for advances on joint venture, the statute would not commence running till offer to account or demand made for repayment. *Hill v. Haskin*, 42 Cal. 159.

Within one  
year.

**340. Within one year:**

1. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the State, except where the statute imposing it prescribes a different limitation;

2. An action upon a statute for a forfeiture or penalty to the people of this State;

3. An action for libel, slander, assault, battery, false imprisonment, or seduction;

4. An action against a Sheriff or other officer for the escape of a prisoner, arrested or imprisoned on civil process;

5. An action against a municipal corporation for damages for injuries to property caused by a mob or riot.

Within six  
months.

**341. Within six months:**

An action against an officer, or officer *de facto*:

1. To recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as Tax Collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

2. To recover stock sold for a delinquent assessment, as provided in Section 347 of the Civil Code.

No limita-  
tion.

**348. (N. S.)** To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan society, there is no limitation.

**350.** The time to which the Statute of Limitations runs is the filing of the original complaint. The filing of an amended complaint does not extend this time up to the period when it is filed. *Lorenzana v. Camarillo*, 45 Cal. 125.

**352.** (Subd. 4.) Statute of Limitations runs against a married woman as to her separate property; the amendment of April 18th, 1863 (Stat. 1863, p. 325), having changed the rule of the Statute of 1850 on this subject. *Kapp v. Griffith*, 42 Cal. 411.

**CREDITOR.**—Under the provisions of section twenty-one of the United States Bankrupt Act of 1867, a creditor who has proved his debt is deemed to have waived his right of action against the bankrupt. *Wilson v. Capuro*, 41 Cal. 545.

**PARTNER.**—It may not be necessary, in order to enable a partner to maintain an action at law against a copartner, or one who has been such, to show an express promise to pay an ascertained balance, but the balance itself must be one which has been ascertained by the act of all the partners, and agreed to as constituting a balance due. *Ross v. Cornell*, 45 Cal. 133.

**EXTORTION.**—Any private citizen may make complaint in the District Court against an officer for extortion in, or neglect of, official duties under the act of March 14th, 1853. *Matter of Marks*, 45 Cal. 199.

**NUISANCE.**—The facts that the parties who bring an action to prevent or abate a nuisance over land fronting on the road, and have no other means of access to their lands except over and along the road, do not show such special damage to the plaintiffs, in addition to that sustained by the public as enables them to maintain the action. *Aram v. Shallenberger*, 41 Cal. 449.

**369.** An administrator who is a party to an action involving title of his intestate to real property, represents the title which the deceased had at the time of his death. *Cunningham v. Ashley*, 45 Cal. 485. Heir or devisee cannot maintain ejectment while the administration is unclosed. *Chapman v. Hollister*, 42 Cal. 464. The general rule is that ejectment can be maintained only against the real party in possession, although he is not personally on the premises, but may be in possession through servants and employees. *Polack v. Mansfield*, 44 Cal. 38. When employee becomes proper party defendant. *Id.*

**370.** When a married woman is a party, her husband must be joined with her, except:

Married woman as party.

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.





3. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone.

(Subd. 1.) Husband need not be joined with wife in action for recovery of her separate property. *Kapp v. Griffith*, 44 Cal. 412.

Infant to  
appear by  
guardian.

372. When an infant is a party, he must appear either by his general guardian, or by a guardian appointed by the Court in which the action is prosecuted, or by a Judge thereof. A guardian may be appointed in any case, when it is deemed by the Court in which the action is prosecuted, or by a Judge thereof, expedient, to represent the infant in the action, notwithstanding he may have a general guardian, and may have appeared by him.

372. Jurisdiction over infant, how obtained. *Smith v. McDonald*, 42 Cal. 489.

Who may  
sue for in-  
jury and  
death of  
child.

376. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

376. Real party in interest. *Karr v. Parks*, 44 Cal. 48. Evidence in action admissible. *Taylor v. W. P. R. R. Co.*, 45 Cal. 323.

When rep-  
resentatives  
may sue.

377. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.

Damages.

**379.** If A makes a verbal contract with B to sell him a tract of land, and puts him in possession, B is a necessary party to an action commenced by the judgment creditors against A, to be subrogated to B's rights in the land. *Logan v. Hale*, 42 Cal. 645. Where several persons have been jointly concerned in a series of fraudulent acts, they may be united as defendants in a suit to annul the fraudulent acts, although the gains they realize by such acts are several. *Andrews v. Pratt*, 44 Cal. 309.

**380.** In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants; and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.

Defendants  
in action to  
determine  
adverse  
claims.

**381.** Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

Claimants  
under a  
common  
source of  
title, may  
unite.

**385.** An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the Court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

Action,  
when not to  
abate.

Substitu-  
tion.

**ON DEATH OF PLAINTIFF.**—On the death of the plaintiff, the Court may, by an express order, substitute his representative as plaintiff. *Taylor v. W. P. R. R. Co.*, 45 Cal. 323.

**ON TRANSFER OF INTEREST.**—Substitution and continuance of action on transfer of interest. *Corwin v. Bensley*, 43 Cal. 261.







Interven-  
tion when,  
and how.

**387.** Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the Court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.

**INTERVENTION.**—If answers of intervention are filed in the Court below, by persons not parties to the record, and the plaintiff makes no objection, but goes to trial, he cannot afterward raise the objection. *Smith v. Penroy*, 44 Cal. 161.

**389.** When one of the defendants in a joint judgment sues to have the judgment perpetually enjoined, his co-defendants should be made parties to the action, or sufficient reasons for the omission to make them parties, should be stated in the complaint. *Gates v. Lane*, 44 Cal. 392. In such case the Court should require the omitted parties to be brought in.

Action  
how com-  
menced.

**405.** Civil actions in the Courts of this State are commenced by filing a complaint.

**Action, when commenced.** *Lorenzana v. Camarillo*, 45 Cal. 125. See ante, § 350.

Indorse-  
ment on  
complaint.

Summons.

**406.** The clerk must indorse on the complaint the day, month and year that it is filed, and at any time within one year thereafter, the plaintiff may have a summons issued; and if the action be brought against two or more defendants, who reside in different counties, may have a summons issued for each of such counties at the same time. But at any time within the year after the complaint is filed, the defendant may, in

writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year, at any time before trial.

Waiver of  
summons.

**SUMMONS WAIVED BY APPEARANCE.**—The only purpose of a summons is to bring the defendant into Court, and if he appears and answers, he waives any defect in the summons. *Randall v. Falkner*, 41 Cal. 242. A notice, signed by attorneys, and filed with the clerk after a complaint has been filed, stating that we have been retained by, and hereby appear for the above named defendant, in the above entitled action, is a sufficient appearance and a waiver of summons. *Dyer v. North*, 44 Cal. 157. Appearance by attorney gives the Court jurisdiction. *Mahoney v. Middleton*, 41 Cal. 41. The voluntary appearance in the Probate Court of an executor, in proceedings relating to the estate, is a waiver of the issuance and service of citation on him. *Estate of Johnson v. Tyson*, 45 Cal. 257.

**DISMISSAL OF ACTION FOR FAILURE TO PROSECUTE.**—Where complaint was filed and summons issued more than eight years before service, a motion to strike out the complaint was properly granted. *Carpentier v. Minturn*, 39 Cal. 450. If a summons is not served until three years after the complaint is filed, and it is issued, and there is no reasonable excuse for the delay, the service will be set aside on motion, and the action dismissed. *Eldridge v. Kay*, 45 Cal. 49. Effect of dismissal without trial. *Davenport v. Turpin*, 43 Cal. 598.

**407.** The provisions of the statute, as to what the summons shall state, are not merely directory, but are mandatory. *Lyman v. Milton*, 44 Cal. 630. A summons must state the names of all the parties to the action. Where there are several defendants, it is not sufficient to give the name of one in the summons, followed by the words "*et al.*" *Lyman v. Milton*, 44 Cal. 630. The question as to the right to amend the summons by inserting the names of defendants after motion to dismiss, spoken of. *Lyman v. Milton*, 44 Cal. 630.

(Subd. 1.) Sufficient statement in summons. *King v. Blood*, 41 Cal. 317. Insufficient statement. *Lyman v. Milton*, 44 Cal. 633.

(Subd. 2.) District defined. *McCauley v. Fulton*, 44 Cal. 360.

**409.** In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the Recorder of the county in which the property is situated, a notice of the pendency of the

Construc-  
tive notice  
of pendency  
of action,  
how given.





action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only, shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

In an action to enforce the lien of a tax by a sale of the property, it is not necessary to file a *lis pendens*. *Reeve v. Kennedy*, 43 Cal. 643. The object of the statute was not to restrict the right of alienation but to hold the interest of the losing party subservient to the judgment. *Corwin v. Bensley*, 43 Cal. 263.

Summons,  
how served  
and re-  
turned.

**410.** The summons may be served by the Sheriff of the county where the defendant is found, or by any other person, over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. When the summons is served by the Sheriff, it must be returned, with his certificate of its service, and of the service of any copy of the complaint where such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint, where such copy is served.

When there are several defendants, and all are served with summons in one county, the presumption is that all resided in the county where served, and a service of a copy of the complaint on one is deemed a service on all. *King v. Blood*, 41 Cal. 314. A summons cannot be served by delivering a copy to the attorney in fact of the defendant. *Drake v. Duvenick*, 45 Cal. 455. Sufficiency of service where there are several parties. *Drake v. Duvenick*, 45 Cal. 465.

**Tax Suit.**—Service of summons in action for the collection of a tax and the enforcement of its lien on real estate. *People v. Bernal*, 43 Cal. 385.

**UPON CORPORATIONS.**—Service of summons upon President *de jure*, held sufficient. *Eel River Nav. Co. v. Struver*, 41 Cal. 616.

**411.** The summons must be served by delivering a copy thereof, as follows: Summons upon whom served.

1. If the suit is against a corporation formed under the laws of this State: to the president or other head of the corporation, secretary, cashier, or managing agent thereof;

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business and having a managing or business agent, cashier or secretary within this State: to such agent, cashier, or secretary;

3. If against a minor, under the age of fourteen years, residing within this State: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed;

4. If against a person residing within this State who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed: to such person and also to his guardian;

5. If against a county, city, or town: to the president of the Board of Supervisors, president of the Council, or Trustees, or other head of the legislative department thereof;

6. In all other cases to the defendant personally.

Where, in a suit against infants, there was no personal service upon them, but their general guardian appeared and defended for them, such appearance gave the Court jurisdiction of their persons. *Smith v. McDonald*, 42 Cal. 484. Mere irregularity in the service of a summons does not render a judgment void for want of jurisdiction. *Drake v. Duvenick*, 45 Cal. 455.

**413.** The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months. In case of publication, where

Service by publication, how made.







the residence of a non-resident or absent defendant is known, the Court or Judge must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State, is equivalent to publication and deposit in the post office; and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication.

415. When the return on a summons states that a copy of the summons was personally served on the defendant in the action, giving the time and place, this return, although informal, is yet sufficient to give the Court jurisdiction of the person. *Drake v. Duvenick*, 45 Cal. 455. In making service of a summons, and in the return of such service, the provisions of the statute must be, and must be shown to have been, substantially observed and followed by the officer; otherwise the proceedings cannot be supported upon a direct appeal taken. *People v. Bernal*, 43 Cal. 385. The statute does not require any particular form of certificate or affidavit, except that "it shall state the time and place of service." *Drake v. Duvenick*, 45 Cal. 463.

Jurisdiction  
when ac-  
quired—  
appear-  
ance.

416. From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the Court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him.

The fact of service is material, and from the time the service was made the Court is deemed to have acquired jurisdiction. *Drake v. Duvenick*, 45 Cal. 463. A motion to set aside the service of a summons may be made without entering an appearance in the action. *Eldridge v. Kay*, 45 Cal. 49.

420. In pleadings, the essential facts upon which the legal points in the controversy depend, should be stated with clearness and precision, so that nothing is left for the Court to surmise. *Gates v. Lane*, 44 Cal. 392. Unless the facts essential to the support of the case be alleged in the pleadings, evidence upon such omitted facts cannot be heard or considered. *Hicks v. Murray*, 43 Cal. 519.

**426. BAIL BOND.**—In an action upon a bail bond given by a person held on a criminal charge, the complaint must allege that the person bailed was released from custody upon the execution and delivery of the bond. *Los Angeles Co. v. Babcock*, 45 Cal. 252.

**BREACH OF CONTRACT TO PURCHASE LAND.**—In such a case the complaint must allege a tender of a conveyance. *Bohall v. Diller*, 41 Cal. 532.

**CONTEST FOR PURCHASE OF LANDS.**—A complaint in an action between contesting applicants to buy lien lands, must aver that the Surveyor General has made application to the Register to have the land accepted in part satisfaction of the grant under which it is sought to locate them. *Berry v. Cammet*, 44 Cal. 348.

**CONTRACT.**—In an action to recover money alleged to be due on a contract, an allegation that the sum sued for is now due is a mere conclusion of law. *Doyle v. Phoenix Ins. Co.* 44 Cal. 264.

**CONTRACT.**—As against the plaintiff, the presumption is that his complaint correctly states the contract which was the cause of action. *Johnson v. Moss*, 45 Cal. 515.

**DAMAGES.**—In an action for damages, the plaintiff must allege that he has sustained damages. *Bohall v. Diller*, 41 Cal. 532.

**EJECTMENT.**—The vendor will not be permitted to aver, if he brings an action to recover possession from the party holding under the contract, that he sold less than the whole title to the land, unless he can also aver that the written contract, by reason of fraud, mistake, or the like, does not show the real contract. *Marshall v. Caldwell*, 41 Cal. 611.

**EJECTMENT BY EXECUTOR.**—Sufficient averment of seizin and right of possession. *Salmon v. Wilson*, 41 Cal. 595.

**INSURANCE.**—In the complaint, in an action on an insurance policy, by the terms of which the loss is to be estimated, and paid sixty days after due notice and proof of the same, an allegation that the plaintiff performed all the conditions on his part, and gave the defendant due notice and proof of the fire and loss, and demanded payment, does not show that sixty days had elapsed after proof and notice, before bringing suit; and the complaint does not state a cause of action. *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264.

**JUDGMENT.**—In a complaint in an action on a judgment, it is unnecessary to aver that an execution has been issued on the judgment, and an unsuccessful effort made to collect it. *King v. Blood*, 41 Cal. 314.

**LIBEL.**—A colloquium in a complaint for libel cannot be supplied by an inuendo. The colloquium states the extrinsic facts to show the libelous meaning of the words, and the inuendo applies the words to these facts. *Clarke v. Fitch*, 41 Cal. 472.

**NUISANCE.**—Special damages to private persons, for nuisance in obstructing a public highway, must be particularly stated in the complaint. The means by which the damages were caused must be alleged. *L. T. Co. v. S. & W. W. R. Co.*, 41 Cal. 562.





**PROMISSORY NOTE.**—A complaint on a promissory note should allege that the note remains due and unpaid. Without such allegation it does not state facts sufficient to constitute a cause of action. *Davanay v. Eggenhoff*, 43 Cal. 395.

**RECOGNIZANCE.**—Sufficiency of complaint in action on. *People v. Eaton*, 41 Cal. 657.

**RECOVERY OF MONEY**, paid on land, averment of tender. *Englander v. Rogers*, 41 Cal. 420.

**REPLEVIN.**—The plaintiff in replevin cannot aver that the defendant is in possession of the property, and then on the trial recover judgment against him on the ground that he was not in possession. *Hawkins v. Roberts*, 45 Cal. 38.

**RESCISSION OF CONTRACT.**—In order to recover possession of premises on the ground of rescission of contract, the plaintiff must allege a repayment or tender of the amount paid by the defendant at the execution of the contract. *Bohall v. Diller*, 41 Cal. 532.

**RESCISSION OF CONTRACT.**—In an action to rescind a sale of real estate, on the ground of fraudulent representations, security averred in the complaint to have been given for the purchase money, will be presumed to be adequate, unless the contrary is expressly averred. *Purdy v. Bullard*, 41 Cal. 414.

**SETTING ASIDE EXECUTION SALE.**—In a complaint to set aside an execution sale, made under a judgment, on account of matters extrinsic to the judgment, at which the purchaser was not a party, if there is no averment that the purchaser had notice of such extrinsic facts, he will be deemed a purchaser without notice. *Reeve v. Kennedy*, 43 Cal. 643.

**SPECIFIC PERFORMANCE.**—Tender an averment that the plaintiff has been ready and willing, and has offered to accept a conveyance according to the agreement, and to pay the balance of the purchase money, is not an averment that he tendered the purchase money. *Englander v. Rogers*, 41 Cal. 420.

**STATUTE OF FRAUDS.**—An averment in a complaint, that an agreement was made to sell land, is sufficient, without alleging that it was in writing and signed. If denied, the proof must show these facts. *Vassault v. Edwards*, 43 Cal. 459.

**STREET ASSESSMENTS.**—Averment of resolution of intention, sufficient to support judgment by default. *Dyer v. North*, 44 Cal. 157.

**TENANCY IN COMMON.**—An averment in a complaint, where there are several plaintiffs, that the plaintiffs own seven tenths of certain real estate, raises the legal presumption that they own it as tenants in common. *Reynolds v. Hosmer*, 45 Cal. 616.

**TRESPASS.**—In an action for damages caused by the sale of plaintiff's real estate, under an execution issued under an erroneous judgment, afterwards reversed, it is not necessary in the complaint to make a direct averment of the existence of the property, if that fact appears by necessary inference from facts stated. *Reynolds v. Hosmer*, 45 Cal. 616.

**427.** The several causes of action upon which a party relies must be set out with directness and precision, the amount due upon each cause of action being separately stated. *Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 17. A complaint setting up in one count ownership in, and ouster from, a certain water right, and also a site for a dam, and the land on which a dam is built, and praying for restitution, improperly unites several causes of action. *Nev. & Sac. Canal Co. v. Kidd*, 43 Cal. 108.

**430.** (Subd. 4.) **MISJOINDER OF PARTIES.**—When it appears on the face of the complaint that there is a misjoinder of parties plaintiff, the objection must be taken by demurrer, and cannot be taken by answer. *Tennent v. Pfister*, 45 Cal. 270.

(Subd. 5.) Where the complaint set forth a contract to build a dam, the failure of defendants to comply therewith, and alleged damages to plaintiffs on account of loss of profits which they would have made by their ditch if the dam had been built, and demanded judgment for damages: *Held*, that demurrer on the ground that it united two causes of action would not lie. *Reedy v. Smith*, 42 Cal. 245.

(Subd. 6.) Under the general demurrer that the complaint does not state facts sufficient to constitute a cause of action, an objection cannot be taken that it is merely ambiguous. *Slattery v. Hall*, 43 Cal. 191. If a complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. *White v. Lyons*, 42 Cal. 279.

(Subd. 7.) A complaint is ambiguous, unintelligible and uncertain, which avers that plaintiff delivered a horse to defendant of the value of three hundred dollars, on an agreement that the latter would sell him and account for the proceeds; and that defendant accepted the horse, and promised to sell him at that price and account for the proceeds, and that defendant sold the horse without stating at what price. *Tomlinson v. Monroe*, 41 Cal. 94. A demurrer on the ground of ambiguity should be overruled, if enough appears to render the pleading demurred to easy of comprehension, and free from reasonable doubt. *Salmon v. Wilson*, 41 Cal. 595. In an action to compel the conveyance of land, the complaint did not clearly set forth whether the title which the defendant agreed to obtain, and did obtain, was a title to the land as lien land, or a title under the pre-emption laws of the United States: *Held*, ambiguous and uncertain. *Hudson v. Johnson*, 45 Cal. 21. A demurrer to a complaint for ambiguity must state wherein it is ambiguous. *Lorenzana v. Camarillo*, 45 Cal. 125. A defect in a complaint for uncertainty must be taken by special demurrer. *Reynolds v. Hosmer*, 45 Cal. 616.

**SPECIAL DEMURRER.**—Grounds of special demurrer which were not presented in the Court below, will not be considered in the Supreme Court. *Gale v. T. C. Wat. Co.*, 44 Cal. 43.

**434.** **OBJECTIONS WAIVED BY FAILURE TO DEMUR.**—When a complaint is defective in manner rather than in matter, if no objection is taken by demurrer, it will be held sufficient to support a judgment. *Russell v. Mixer*, 42 Cal. 476.







Answer,  
what to  
contain.

**437.** The answer of the defendant shall contain :

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counterclaim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.

(Subd. 1.) **INSUFFICIENT DENIALS.**—If the complaint avers that the defendant wrongfully broke down plaintiff's flume, and the answer denies that the defendant wrongfully broke down the flume, it is an admission that the defendant broke down the flume, and only a denial of its wrongful character. *Feely v. Shirley*, 43 Cal. 370.

**ADMISSIONS IN PLEADINGS** bind a party. *Hellman v. Howard*, 44 Cal. 101 ; *Hall v. Polack*, 42 Cal. 219. All evidence contrary to admissions to be disregarded. *Id.* The question as to what facts are admitted is for the Court and not for the jury. *Tevis v. Hicks*, 41 Cal. 123. Answer admitting a trust. *Scott v. Umbarger*, 41 Cal. 410.

(Subd. 2.) **ANOTHER ACTION PENDING.**—The defense that there is another action pending between the same parties for the same cause of action must be pleaded. *Walsworth v. Johnson*, 41 Cal. 61.

**EQUITABLE DEFENSE.**—The sufficiency of an equitable defense in an action at law is to be determined by the application of the rules of pleading observed in Courts of Equity, when relief is sought there in cases of like character. *Bruck v. Tucker*, 42 Cal. 352.

**ESTOPPEL.**—An estoppel which is of equitable cognizance must be pleaded. *Etcheborne v. Anzerais*, 45 Cal. 122.

**FRAUD.**—In an action to recover damages for taking personal property, the defendant, who has taken the property from the plaintiff, cannot show in defense that the former owner made a fraudulent sale of the property to the plaintiff, unless in his answer he makes himself the representative of the former owner and alleges he was defrauded by the sale. *Leszinsky v. White*, 45 Cal. 278.

**JUDGMENT NO BAR.**—A judgment in a former action is well pleaded as a bar to a second action, provided the cause of action is the same, though the form of action has been changed. *Taylor v. Castle*, 42 Cal. 367. What is the "same cause of action." *Id.*

**JUSTIFICATION BY LICENSE.**—In order to justify the excavation of a ditch on the land of another under a parol license, the license must be pleaded. *Alford v. Barnum*, 45 Cal. 482.

**PLEA IN ABATEMENT.**—A plea in abatement of the non-joinder of other parties who were alleged to be necessary defendants, if proved on the trial, must prevail, even if plaintiff was ignorant of the fact that such parties were necessary. *McDonald v. Backus*, 45 Cal. 262.

**PLEA IN AVOIDANCE.**—If the wife seeks to avoid her mortgage, on the ground of the same having been executed or acknowledged under compulsion or undue influence, she must allege such to be the fact. An allegation that she did not acknowledge it freely and voluntarily, is not sufficient. *Conn. L. Ins. Co. v. McCormick*, 45 Cal. 590.

**PRESCRIPTION.**—A defendant in an action for the diversion of water, cannot have the benefit of an adverse use or prescription, unless it is specially pleaded. *Mathews v. Ferrea*, 45 Cal. 51. The user must be adverse for the requisite period after the title passed from the United States, in case of a purchase of public domain. *Id.*

**COUNTER CLAIM.**—It must appear that the counter claims relied on, existed in favor of defendant at the commencement of the action. *Gannon v. Dougherty*, 41 Cal. 661. What constitutes a counter claim in action on a promissory note, query? *Curtis v. Sprague*, 41 Cal. 59.

**IN PARTICULAR ACTION, BREACH OF PROMISE OF MARRIAGE.**—The interposition of a defense that the character of the plaintiff is unchaste, even if successful, ought not, *per se*, to aggravate the damages unless it is interposed in bad faith, from malice, wantonness, or recklessness. *Powers v. Wheatley*, 45 Cal. 113.

**CONTRACT.**—The omission of a United States internal revenue stamp, cannot be set up as a defense in a State Court to an action on contract. *Duffy v. Hobson*, 40 Cal. 240, affirmed; *Thomasson v. Wood*, 42 Cal. 417.

**DAMAGES.**—In an action for damages, a denial in the answer that the plaintiff has suffered damage in the exact sum claimed in the complaint, is insufficient. *Huston v. T. & C. C. T. R. Co.*, 45 Cal. 550.

**DISCHARGE IN INSOLVENCY.**—An averment in an answer that the plaintiff's debt is barred by a discharge in insolvency, is only a conclusion of law, and not the statement of a fact. *Christy v. Dana*, 42 Cal. 175.

**EJECTMENT.**—When Statute of Limitations not a bar to the equitable defense of the vendee in possession and to his right to affirmative relief. *Gerdes v. Moody*, 41 Cal. 335. If a defendant desires to avail himself of an equitable title, he must plead it, and ask for affirmative relief. *Kenyon v. Quinn*, 41 Cal. 325.

**EJECTMENT.**—In an action of ejectment by one tenant in common against another, the latter can not invoke the maxim *ex dolo malo*, nor *oritur actio*, nor defend upon the ground that he and plaintiff entered upon the premises wrongfully in the first instance. *Bornheimer v. Baldwin*, 42 Cal. 27.

**EJECTMENT.**—If plaintiff relies on a paper title, defendant may show the true title to be outstanding on a third person, without connecting himself with it. *Cranmer v. Porter*, 41 Cal. 462. Where defendant pleads the general issue, and then sets up title in himself, the plea of title amounts to nothing, and may be omitted. *Bruck v. Tucker*, 42





Cal. 346. A title acquired by defendant *pendente lite*, must be set up by supplemental answer. *Thompson v. McKay*, 41 Cal. 221.

**EJECTMENT.**—The defendant can not, for the purpose of defeating title acquired by a Sheriff's deed under a sale on a judgment foreclosing a lien for taxes, avail himself of defects in the assessment roll of which purchaser had no notice when he purchased. *Jones v. Gillis*, 45 Cal. 541.

**MANDATE.**—The answer to a petition for a writ of mandate presented to the Supreme Court, may deny the allegations of the petition upon information and belief. *People v. Alameda Co.*, 45 Cal. 395.

**MECHANIC'S LIEN.**—Where the answer averred that the value of the labor "was not over the sum of fifteen dollars or twenty dollars:" *Held*, that it was a denial that the value of the labor was seventy-six dollars, as alleged. *Way v. Oglesby*, 45 Cal. 655. The defendant, in order to avail himself of the breach of the contract by the contractor, must make it a part of his defense by proper averments in his answer. *Blethen v. Blake*, 44 Cal. 117.

**PROMISSORY NOTE.**—If the complaint, without being verified, contains a copy of the note, and avers that it has not been paid, a general denial puts in issue the fact of payment. *Duvanay v. Eggenhoff*, 43 Cal. 395.

**PROMISSORY NOTE.**—The fact that contemporaneously with a promissory note, a parol agreement was made that the note should be payable only out of the surplus arising from the sale of goods assigned to the payor as security for a debt due him, it appearing no such surplus has arisen, is no defense in a suit to the note. *Guy v. Bibend*, 41 Cal. 322.

**REPLEVIN.**—The subject matter of litigation in replevin is the property mentioned in the complaint, and the defendant cannot, in his answer, allege that the plaintiff has taken from him other property than that mentioned in the complaint; and ask or obtain judgment for its return. *Levensohn v. Ward*, 45 Cal. 8.

**SETTING ASIDE JUDGMENT BY CONFESSION.**—Allegations in the answer to an action to set aside a judgment by confession of facts out of which the indebtedness arose, are matters in avoidance of the *prima facie* fraudulent judgment, and are new matter. *Pond v. Davenport*, 45 Cal. 225.

**UNLAWFUL DETAINER.**—Generally, *Randall v. Falkner*, 41 Cal. 242. If the tenant fails to pay rent when it falls due, and for three days after a demand thereof, and for possession of the premises by the landlord, his subsequent tender thereof, with interest and costs, is no defense in an action of unlawful detainer. *Roussel v. Kelly*, 41 Cal. 360.

438. A claim of A. & B. to recoup damages from C. by way of set off against the promissory note of A., B. and D., held by C., cannot be sustained, nor can such claim for damages be set off against an aliquot part of the sum due on the note. *54 King v. Wise*, 43 Cal. 628. An execution in favor of P., and against C., cannot be set off against an execution in favor of C. & D. against P., the parties to the two executions not being the same. *Calderwood v. Peyser*, 42 Cal. 111.

**440.** When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.

Cross-demands deemed compensated.

**CROSS-COMPLAINT.** — If defendant calls his answer a counter-claim, and goes to trial on that theory, he will not be permitted for the first time in the Supreme Court to call it a cross-complaint to obtain a review of an order denying his motion for judgment on the pleadings. *McAbee v. Randall*, 41 Cal. 136. Neither an agreed statement of facts nor a finding of facts can add a material fact to a cross-complaint. It must fall unless it can stand on its own allegations of facts. *Collins v. Bartlett*, 44 Cal. 372.

**441.** A defense regarded as an entirety is not to be defeated nor disregarded merely because it is inconsistent with some other plea or defense pleaded. *Buhne v. Corbett*, 43 Cal. 265.

**442.** (N. S.) Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the Court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint.

Cross-complaint.

**443.** The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defenses or counter-claims set up in the answer.

Demurrer to answer.

**446.** If the plaintiff goes to trial on the merits, without objection to the verification of an answer, he will not be allowed to raise the point in the Appellate Court that it was not properly verified. *McCullough v. Clark*, 41 Cal. 298.







Genuine-  
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instrument  
how contro-  
verted.

448. When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant.

453. It is error in the Court to strike out a counter-claim, in an answer, without a motion being made for that purpose. *Curtis v. Sprague*, 41 Cal. 55. A replication setting up the Statute of Limitations to a counter claim does not authorize the Court to strike out the counter claim. *Id.* A demurrer to a replication filed to a counter-claim is not equivalent to a motion to strike out the counter-claim. *Id.*

461. When libel cannot be justified by proof that the author believed it to be true. *Wilson v. Fitch*, 41 Cal. 363. The defendant cannot introduce in evidence libelous articles published by other persons anterior to the publication of the alleged articles. *Id.*

Pleadings  
to be filed  
and served.

465. All pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party or his attorney.

Variance,  
when  
material.

469. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the Court may order the pleading to be amended, upon such terms as may be just.

Amend-  
ments of  
course an  
effect of  
demurrer.

472. Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time ; and when the demurrer to complaint is overruled and there is no answer filed, the Court may, upon such terms as may

be just, allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer must be considered as denied, to the extent mentioned in §462.

473. The Court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The Court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may, upon like terms, allow an answer to be made after the time limited by this Code, and also relieve a party, or his legal representative, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any reason satisfactory to the Court, or the Judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the Court, or the Judge thereof, in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. When, from any cause, the summons in an action has not been personally served on the defendant, the Court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action.

Amend-  
ments on  
terms.

Discretion  
and power  
of court.

Affidavit  
may be  
disregard-  
ed.

When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond, is sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property, and





that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the Court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made.

AMENDMENTS should be allowed with great liberality in all stages of the proceedings, unless the opposite party would thereby lose an opportunity to fairly present his whole case. *Kirstein v. Madden*, 38 Cal. 15. Consult generally *Carpentier v. Small*, 35 Cal. 346; *Clark v. Phoenix Ins. Co.*, 36 Cal. 168; *People v. Nelson*, 36 Cal. 375; *N. C. & S. C. Co. v. Kidd*, 37 Cal. 282; *Fulton v. Cox*, 40 Cal. 101.

AMENDMENT TO COMPLAINT.—When it appears on the trial that there is a variance between the proof and the complaint, and an objection to the evidence is made on that ground by the defendant, the Court will, if an application is made, allow the complaint to be amended. *Bell v. Knowles*, 45 Cal. 193. If the Court during the trial grants leave to file an amendment to the complaint, and it is filed before the argument is concluded, and there is nothing in the record to show the other party was not present and consenting, the amendment will not be disregarded in the Supreme Court. *Reynolds v. Hosmer*, 45 Cal. 616. A material variance between the contract as alleged and proved, is a ground of nonsuit, unless plaintiff obtains leave to amend his complaint so as to make it conform to the proofs. *Tomlinson v. Monroe*, 41 Cal. 94.

RELIEF FROM JUDGMENT.—If a motion is made by persons other than the plaintiff, claiming to be his legal representatives, to set aside a judgment and to be substituted as plaintiffs, the parties making such motion must show such a state of facts as would have supported such an application by the plaintiff in the judgment. *Corwin v. Bensley*, 43 Cal. 253. Possibly the above rule would not apply in the case of an executor or administrator, moving in behalf of creditors, to open a judgment collusively or negligently suffered by the testator or intestate, by which the creditors may be damnified. *Id.*

MISTAKE AS TO PARTIES.—A mistake as to the enumeration of parties plaintiff, in entering judgment in ejectment, is no ground for a motion to vacate the judgment. *Mann v. Haley*, 45 Cal. 653. If the clerk in entering up judgment, omits, by mistake, the names of some of the plaintiffs, the Court will, on motion, allow the mistake to be corrected. *Id.* Showing required on motion for retaxation of costs made after adjournment of term. *Dooly v. Norton*, 41 Cal. 443. Showing required to authorize the Court to relieve a party, or his legal representatives, from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect. *Corwin v. Bensley*, 43 Cal. 258.

**474. FICTITIOUS NAME.**—Where a person is sued by a fictitious name, judgment against him will not be binding, unless the complaint be amended by inserting his true name, so as to allege that he is the person charged. *McKinlay v. Tuttle*, 42 Cal. 571. Where persons sued and served under fictitious names, appear and answer the complaint, such answer is not a waiver of an amendment of the complaint describing them by their true names. *Bohannon v. Hammond*, 42 Cal. 227.

**475.** Technical errors or defects in summons, in statement of cause of action, to be disregarded. *King v. Blood*, 41 Cal. 317.

**476. (N. S.)** When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order. Time to  
amend.

**478.** The provisions of this section have reference to mesne and not to final process. *Stewart v. Levy*, 36 Cal., 159.

**479.** The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office, or in a professional employment, or for a willful violation of duty; Defendant,  
when sub-  
ject to  
arrest.

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been\* concealed, removed, or disposed of, to prevent its being found or taken by the Sheriff;

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought;

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\* The word fraudulently is omitted.







5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

Affidavit for order of arrest, requisite.

481. The order may be made whenever it appears to the Judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in §479. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the Court.

Undertaking required of plaintiff.

482. Before making the order, the Judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the Judge, which must be at least five hundred dollars, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. The undertaking must be filed with the clerk of the Court.

Qualifications of bail.

494. The qualifications of bail are as follows:

1. Each of them must be a resident and householder, or freeholder, within the State;

2. Each must be worth the amount specified in the order of the arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the Judge, or County Clerk, on justification, may allow more than two sureties to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Motion to vacate order of arrest or reduce bail.

503. A defendant arrested may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the Judge who made

the order, or the Court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made.

Contest of motion.

521 of said Code is repealed.

**526. CONSTRUCTION OF WHARF.**—A person who is the owner of and in possession of a private wharf, is entitled to a perpetual injunction, restraining the construction of another wharf in front of his, which will cut his wharf off from the navigable waters of the bay, unless the person constructing the same show a lawful right, proceeding from competent authority, to erect the proposed wharf. *Cowell v. Martin*, 43 Cal. 605.

**EXECUTION SALE.**—If the owner of a large tract of land contracts to sell a part of it, and the judgment creditors of the party with whom he contracts, attempt to sell the whole tract on execution, the Court intimates that the owner may enjoin the sale, except as to the part contracted to be sold. *Logan v. Hale*, 42 Cal. 645.

**JUDGMENT.**—If the judgment of a Justice of the Peace is void on its face, will its enforcement by execution be restrained by injunction, query? *Gates v. Lane*, 44 Cal. 392.

**PAYMENT OF COUNTY WARRANTS.**—A Court of Equity, on the complaint of a taxpayer, will enjoin the payment of, and cancel county warrants illegally drawn on the Treasurer, by order of the Board of Supervisors. *Andrews v. Pratt*, 44 Cal. 309.

**TRESPASS.**—In an action for damages, and to enjoin future trespasses on land, the Court, in granting the injunction, should not extend it to land not owned by the plaintiff, although included in the description given in the complaint. *Moore v. Massini*, 43 Cal. 389.

**529.** On granting an injunction, the Court or Judge must require, except where the people of the State are a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the Court finally decide that the plaintiff was not entitled thereto. Within five days after the filing of the undertaking required, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is

Security required.





Justifica-  
tion of  
sureties.

deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a Judge or County Clerk, in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved. (In effect March 30th, 1874.)

**LIABILITY OF SURETIES.**—If the plaintiff in an action to obtain a perpetual injunction, restraining the commission of trespasses, at the time of commencing suit, obtains a preliminary injunction, and on the trial it is made perpetual, and the judgment is afterward reversed, and the action dismissed, the sureties on the injunction bond are not liable for any damage accruing after the entry of the decree making the injunction perpetual. *Webber v. Wilcox*, 45 Cal. 301.

**532. MOTION TO DISSOLVE INJUNCTION.**—When the defendant moves on the complaint and answer, to dissolve an injunction, the answer will be treated for all the purposes of the motion as an affidavit, and the plaintiff, on the hearing of the motion, is entitled to reply to the answer by affidavits. *Delger v. Johnson*, 44 Cal. 182. The plaintiff is not required to serve upon the defendant copies of affidavits used in reply to the answer. *Id.*

**DISCRETION AS TO DISSOLVING INJUNCTION.**—Though an injunction should in general be dissolved when all the equities of the bill are denied by the answer, yet there may be circumstances disclosed by the pleadings under which the Court will, in the exercise of a sound discretion, be justified in the continuing it till the hearing on the merits. *McCreery v. Brown*, 42 Cal. 459.

**533.** The injunction will not be retained when it appears that the acts, the performance of which is sought to be restrained, had been performed before the order for the injunction was made or served. *Delger v. Johnson*, 44 Cal. 182.

Attachment  
when may  
issue and in  
what cases.

**537.** The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured

by any mortgage or lien upon real or personal property, or any pledge of personal property; or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless;

1. In an action upon a contract, expressed or implied, against a defendant not residing in this State.

**WHEN WILL NOT ISSUE.**—One who receives the stock of an association as collateral, to secure him for a liability incurred by signing a promissory note, and who is compelled to pay the note thus signed, cannot sue out an attachment in an action brought to recover the money thus paid. *Beaudry v. Vache*, 45 Cal. 3.

538. The Clerk of the Court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, showing:

*Affidavit for attachment what to contain.*

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter claims,) upon a contract, express or implied, for the direct payment of money, and that such contract was made, or is payable in this State, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security, has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter claims), and that the defendant is a non-resident of the State; and

3. That the attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant.

The affidavit for an attachment need not state the facts out of which the indebtedness of the defendant to the plaintiff arose. *Weaver v. Hayward*, 41 Cal. 117. It need not state the probative facts requisite to establish the ultimate facts required by the statute to be shown as the basis of the writ. *Wheeler v. Farmer*, 38 Cal. 203.







Undertaking on attachment.

539. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, in an amount not less than three hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay all costs, including reasonable attorneys' fees, that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, if the attachment be wrongfully issued. [Repealed. See following section.]

Undertaking on attachment.

539. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a Judge or County Clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the Clerk or Judge shall issue an order vacating the writ of attachment. (In effect March 30th, 1874.)

Justification of sureties.

An undertaking on attachment is an original independent contract on the part of the sureties, and must be construed in connection with the statute which authorizes it. *Frankel v. Stern*, 44 Cal. 168.

541. MONEY IN SAVINGS BANK.—A savings bank cannot avoid its liability to pay over the money of a depositor on a garnishment at the suit of depositor's creditor, on the ground that its by-laws, assented to by the depositor, make his pass book in which his account is kept transferable to order. *Witte v. Vincenot*, 43 Cal. 325.

**542.** (Subd. 2.) It is the duty of the officer to deliver a copy of the attachment to the occupant if there is one; and if there is none, then to post a copy of the attachment in a conspicuous place on the premises. *Sharp v. Baird*, 43 Cal. 579. A service of an attachment on real estate, made by posting a "notice," instead of a copy of the attachment on the most public part of the property attached is not valid, and creates no lien on the property. *Sharp v. Baird*, 43 Cal. 577.

**LIEN OF ATTACHMENT.**—Judgment and execution without levy do not convert attachment lien into "Lien under final process." *Howe v. Union Ins. Co.*, 42 Cal. 528. Lien dissolved by bankruptcy of debtor. *Id.*

**INEFFECTUAL PROCESS.**—See generally, *Briody v. Conro*, 42 Cal. 135; *Main v. Tappener*, 43 Cal. 206; *Plant v. Smythe*, 45 Cal. 161.

To complete the service of an attachment of real property, both the service of the attachment on the occupant, or posting on the premises, and the filing of it with the County Recorder are essential. *Main v. Tappener*, 43 Cal. 206. The service or posting must precede the filing. *Id.* Where the writ was filed and was served a few hours afterward, *Held*, that the doctrine of relation would not apply to make the attachment date from the filing. *Id.*

**550.** Judgment and execution without levy do not convert attachment lien into "lien under final process." *Howe v. Union Ins. Co.*, 42 Cal. 533.

**551.** A payment of the judgment made by the defendant in an attachment suit entitles him to a release of the property held under the writ of attachment, but a mere deposit of the amount, or, a payment made to the Clerk, is not such a payment. *Sagely v. Livermore*, 45 Cal. 616.

**555.** Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders, or householders, in the State, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The Court or Judge making such order may fix the sum for which the undertaking must be executed, and, if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose.

Release  
from attach-  
ment, on  
what terms.





The sureties may be required to justify before the Court or Judge, and the property attached cannot be released from the attachment without their justification, if the same be required.

Motion for discharge of writ, when and before whom made.

556. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the Court in which the action is brought, or to the Judge thereof, or to a county Judge, that the writ of attachment be discharged, on the ground that the same was improperly or irregularly issued.

559. INDORSEMENT. It is the duty of the Sheriff when returning an attachment of real property, to indorse thereon what acts he performed on serving the writ, and it will be presumed that he states all that he did in making the service. *Sharp v. Baird*, 43 Cal. 577.

Receiver, appointment; undertaking on ex parte application.

566. No party, or attorney or person interested in an action, can be appointed receiver therein, without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an *ex parte* application, the Court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the Court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the Court may, in its discretion, at any time after said appointment, require an additional undertaking.

577. FINALITY OF JUDGMENT, generally. *Allen v. Currey*, 41 Cal. 322. A decree ascertaining and adjudging a certain sum of money due to a party, and determining the whole matter in litigation, is a final judgment. *Clark v. Dunnam*, July T. 1873.

ENTRY OF JUDGMENT.--A final judgment may be entered either in term time or vacation. *Ex parte Bennett*, 44 Cal. 85. Where a cause has been submitted *in presenti*, a judgment may be entered in vacation. The power to enter the judgment is not dependent upon or affected by the fact of trial. *Ex parte Bennett*, 44 Cal. 85. What constitutes a

submission *in presenti*. *Id.* Where a cause, of which the Court has jurisdiction, is tried at Chambers, by consent of the parties, the judgment rendered therein is not necessarily void, in the absolute sense, for want of a trial in open Court. *Id.* A stipulation of the parties that plaintiff take judgment for a sum named and costs, but that execution be stayed till the decision of another case pending in another Court, and that if said other case is decided for the defendant, for a certain reason, the judgment be set aside, otherwise an execution to issue, authorizes a judgment absolute in terms to be entered for the plaintiff, which will not be set aside if such other case is decided for the defendant, unless it is so decided for the reason given. *Keys v. Warner*, 45 Cal. 60. A joint judgment on a promissory note rendered against the administrator of a deceased maker and the surviving makers, is erroneous as to the administrator, if it is not made payable *de bonis testatoris*; but this error does not invalidate it as to the other defendants. *Bank of Stockton v. Howland*, 42 Cal. 129. The entry of a judgment before overruling exceptions does not vitiate it. *Haley v. Amestoy*, 44 Cal. 132.

**WHAT JUDGMENT SHOULD BE.**—A judgment should be a simple sentence of the law upon the ultimate facts admitted by the pleadings, or found by the Court. *Gregory v. Nelson*, 41 Cal. 278.

**JUDGMENT ON THE PLEADINGS.**—See generally: *Larco v. Clements*, 36 Cal. 132; *Doll v. Good*, 38 Cal. 287; *Agard v. Valencia*, 39 Cal. 292; *Fitzgibbon v. Calvert*, 39 Cal. 261; *Espenosa v. Gregory*, 40 Cal. 58; *Felch v. Beaudry*, 40 Cal. 439; *Tevis v. Hicks*, 41 Cal. 123; *Gregory v. Nelson*, 41 Cal. 278; *Pond v. Davenport*, 45 Cal. 225. Any finding or judgment of the Court repugnant to the facts admitted by the pleadings is erroneous. *Gregory v. Nelson*, 41 Cal. 278.

**WHAT SHOULD NOT CONTAIN.**—A judgment should not declare the existence of facts which are not within the issues made or tendered by the pleadings, nor should it declare the judgment of the Court upon such facts. *Gregory v. Nelson*, 41 Cal. 278. If the judgment decrees the existence of facts not within any issues made or tendered by the pleadings, and then pronounces the judgment of the Court upon such facts, such part of the judgment is superfluous and void. *Gregory v. Nelson*, 41 Cal. 278. A clause in a decree enforcing a mortgage directing the Sheriff, out of the proceeds of the sale of mortgaged premises, to satisfy a judgment against the plaintiff in the foreclosure suit, in favor of a third person, is not a judgment in favor of such third person, and against the defendant in the foreclosure suit, nor does it give such third person any cause of action against such defendants in the foreclosure suit. *Kohlberg v. Benton*, 45 Cal. 265.

**RECITALS IN JUDGMENT.**—A recital in a judgment rendered for a tax on real estate, that all owners and claimants of the property have been duly summoned to answer the complaint, and have made default, is proof of those facts. *Truman v. Robinson*, 44 Cal. 623.

**CONCLUSIVENESS OF JUDGMENT.**—See generally: *Sharp v. Lumley*, 34 Cal. 611; *Mann v. Rogers*, 35 Cal. 316; *Abadie v. Lobero*, 36 Cal. 390; *Satterlee v. Bliss*, 36 Cal. 489; *Vance v. Lincoln*, 38 Cal. 586; *Welton*







v. Palmer, 39 Cal. 456; Rahn v. Mims, 39 Cal. 456. A judgment is conclusive only upon questions involved in the action, and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the action. Phelan v. Gardner, 43 Cal. 307. A judgment concludes only the real party in interest. Stoops v. Woods, 45 Cal. 439.

**ERRONEOUS JUDGMENTS NOT VOID.**—See generally: Ryder v. Cohn, 37 Cal. 69; Moore v. Martin, 38 Cal. 428; Nunan v. San Francisco, 38 Cal. 689; Hunt v. Dohrs, 39 Cal. 304; Page v. Fowler, 39 Cal. 412; Bachman v. Sepulveda, 39 Cal. 688; Judson v. Malloy, 40 Cal. 299. If a deed is fraudulent in law and void, the proper judgment is that the deed be canceled. The judgment should not direct the grantee to reconvey. Upton v. Archer, 41 Cal. 85. A judgment rendered by the Court in a cause in which it has jurisdiction of the subject matter and of the person is not void, even though it may exceed the measure of relief demanded in the complaint, and no answer may have been filed. Chase v. Christiansen, 41 Cal. 253. Execution will not in such case be stayed. *Id.* If, on a jury trial before a Justice of the Peace, the jury find a verdict for a sum certain for the plaintiff, and the Justice thereupon enters the verdict in his docket, but fails to enter up a judgment, it is an irregularity; but not such a one as renders a sale made upon an execution, which recites a judgment, issued thereon, void. Lynch v. Kelly, 41 Cal. 232.

**VOID JUDGMENT.**—A judgment in favor of a dead man is a nullity. McCreery v. Everding, 44 Cal. 284. If, pending action, one of the defendants dies, and on plaintiff's motion his executor is substituted as defendant in his place, and no notice of this fact is served on the executor and he does not appear nor answer, nor adopt the answer of his testator as his own, and the testator is named in the judgment, the rights of the executor are not affected by the trial and judgment, and a judgment is rendered a nullity, so far as he is concerned. *Id.*

**PRESUMPTIONS IN FAVOR OF JUDGMENT.**—The doctrine announced in Hahn v. Kelly, 34 Cal. 391, as to the presumptions indulged in favor of the jurisdiction and correctness of recitals on judgments of Courts of general jurisdiction, applies only in cases where the attack is collateral, and not where the attack is direct. McKinlay v. Tuttle, 42 Cal. 571. The recitals in the judgment are not received on direct attack. *Id.* It is necessary that the record should show that the Court had jurisdiction of the person against whom the judgment was rendered, and that such judgment was warranted by the pleadings of the party in whose favor it was rendered; and in destroying these questions, recitals in the judgment cannot be regarded. *Id.*

**COLLATERAL ATTACK.**—See generally: Sharp v. Lumley, 34 Cal. 611; Sharp v. Brunnings, 35 Cal. 528; Lee v. Figg, 37 Cal. 328; Quivey v. Porter, 37 Cal. 458, affirming Hahn v. Kelly, 34 Cal. 391; Mayo v. Foley, 40 Cal. 281.

**COLLATERAL ATTACK.**—Against a stranger who is an innocent purchaser, at a judicial sale, without notice, the judgment is no more open to attack than if offered in evidence in a collateral action. Reeve v.

**Kennedy, 43 Cal. 644.** In a collateral attack on a judgment which recites the service of summons by publication, the affidavits and order showing service, cannot be considered. **McCanley v. Fulton, 44 Cal. 356.** The presumption is that it was entered in pursuance of an order of the Court. **Id.** In a collateral attack on a judgment of a Court of superior jurisdiction, all intendments are indulged in its support, and whatever is upon its record, is presumed to have been rightfully done. **Drake v. Duvenick, 45 Cal. 455.**

**COLLATERAL ATTACK.**—Judgment against a married woman upon a contract made by her during the marriage, is valid until reversed, and cannot be impeached in a collateral action, on the ground of her coverture. **Gambette v. Brock, 41 Cal. 78.** If the Court has jurisdiction of the subject matter, and of the parties, the decision of all other questions arising, is but the exercise of that jurisdiction, and an erroneous decision cannot impair the validity and binding force of the judgment when brought in question, collaterally. **Chase v. Christianson, 41 Cal. 253.** Where a decree recited that defendants consented to the entry thereof, it will be presumed against collateral attack, that such consent was so presented as to give the Court jurisdiction of their persons, at the date of the decree. **Foote v. Richmond, 42 Cal. 440.** A judgment cannot be attacked, collaterally, by evidence, to show that the parties stipulated to a different judgment from the one entered. **Hobbs v. Duff, 43 Cal. 487.**

**580.** This section has no application to questions of jurisdiction. **Chase v. Christianson, 41 Cal. 256.**

**RELIEF ON JUDGMENT BY DEFAULT.**—See generally: **Quivey v. Baker, 37 Cal. 465 ; Pitts. C. M. Co. v. Greenwood, 39 Cal. 71 ; Choynski v. Cohen, 39 Cal. 501.** It is not necessary that the default of a party should be actually entered up by the clerk before judgment can be taken against him. **Drake v. Duvenick, 45 Cal. 455.** A plaintiff who recovers in trespass *quive clausum fregit* does not thereby become invested with the title, or succeed to the interest which the defendant in such action may have had in the property. **Williams v. Sutton, 43 Cal. 65.**

**581.** See generally: **Poorman v. Mills, 35 Cal. 118 ; Geary v. Simmons, 39 Cal. 224 ; Wolfskill v. Malajowich, 39 Cal. 276 ; Schierhold v. N. B. & M. R. R. Co., 40 Cal. 447 ; Sanchez v. Neary, 41 Cal. 485 ; Wood v. Ramond, 42 Cal. 643 ; Johnson v. Moss, 45 Cal. 515.**

**ON OPENING STATEMENT.**—A defendant moving for a nonsuit on the plaintiff's opening statement upon a specified ground, on which ground alone the motion is granted, will not be allowed to raise the point for the first time in the Supreme Court that the statement was otherwise insufficient. **Raimond v. Eldridge, 43 Cal. 507.** On the trial, the defendant is not precluded from moving for a nonsuit, because he permitted the testimony to be introduced without objection, when the testimony of the plaintiff proves a contract different from that declared on. **Johnson v. Moss, 45 Cal. 515.**

**FOR VARIANCE.**—When the plaintiff proves a contract substantially different from the one declared on, the defendant is entitled to a judgment of nonsuit on the ground of variance. **Id.**





**590.** An issue arises when a fact or conclusion of law is maintained by one party, and is controverted by the other in the pleadings. *Harris v. S. F. Sug. Ref.*, 41 Cal. 404.

Issues by  
whom tried,  
and order  
of trial.

**592.** In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code.

**593.** The position of a cause on the calendar will not be changed to a different day from that on which it is set by the clerk, whether upon stipulation or motion, except for good cause shown. *Wetmore v. San Francisco*, 43 Cal. When a motion is made to place a cause on the calendar of the Supreme Court, in accordance with a stipulation of the parties, it must be shown that the transcript and the briefs or points and authorities of both parties, have been filed, or the motion will be denied. *Plant v. Smythe*, 43 Cal. 42.

**594.** RIGHT OF PARTY TO HAVE CAUSE TRIED. *People v. De la Guerra*, 43 Cal. 42. Right of defendant to separate trial, and duty of Court, *Judson v. Malloy*, 40 Cal. 299. The responsibility of an erroneous order, made on motion, or at the request of one of several defendants, will attach alike to all the defendants, unless it appears that the order or decision was clearly restricted, or would necessarily apply only to particular defendants, or parcels of property. *Id.*

**AFFIDAVIT FOR A CONTINUANCE.**—A continuance will not be granted because of the absence of a witness, unless the affidavit in support of it show that diligence has been used to procure the attendance of the witness, or to obtain his deposition. *Leszinsky v. White*, 45 Cal. 278. Continuance for absence of counsel. *Thompson v. Thornton*, 41 Cal. 626. Insufficient admission on motion for continuance. *Turner v. Lovett*, 41 Cal. 521. Continuance in criminal action. *People v. Williams*, 43 Cal. 345.

**600.** Construed *People v. Scoggins*, 37 Cal. 679, and rule of practice as to peremptory challenges approved. *Taylor v. W. P. R. R. Co.*, 45 Cal. 330.

**601.** Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

Challenges  
peremp-  
tory, how  
taken.

In a civil action, a party is not bound to exercise his right of peremptory challenge, until there are in the jury box twelve persons whom the Court has adjudged to be competent jurors. *Taylor v. W. P. R. R. Co.*, 45 Cal. 323. Right of peremptory challenge. *Taylor v. W. P. R. R. Co.*, 45 Cal. 350.

**602.** Challenges for cause may be taken on one or more of the following grounds:

Grounds of  
challenge.

1. A want of any of the qualifications prescribed by this Code to render a person competent as a juror ;

2. Consanguinity or affinity, within the fourth degree, to any party ;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party ;

4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action ;

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation ;

6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or of some of them ;

7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party.

Right of peremptory challenge. *Taylor v. W. P. R. R. Co.*, 45 Cal. 330.







603. Right of peremptory challenge. *Taylor v. W. P. R. R. Co.*, 45 Cal. 330.

604. Construed, *People v. Scroggins*, 37 Cal. 679, and Rule of Practice as to peremptory challenges approved. *Taylor v. W. P. R. R. Co.*, 45 Cal. 330.

607. ORDER OF INTRODUCING EVIDENCE.—A party is at liberty to introduce his evidence in whatever order he prefers, subject to the control of the Court, in the exercise of a sound discretion. *Crosett v. Whelan*, 44 Cal. 200. See, generally, *Lick v. Diaz*, 37 Cal. 437; *Mayo v. Mazeaux*, 38 Cal. 442; *Sharp v. Lumley*, 34 Cal. 611.

ARGUMENT.—After a cause has been submitted in the Court, it is not error to hear argument at chambers and thereupon to decide the case. *City of San Jose v. Shaw*, 45 Cal. 178.

INSTRUCTIONS.—In a case where a fact is alleged in the complaint and not denied in the answer the jury should be instructed that the fact is admitted in the pleadings. *Tevis v. Hicks*, 41 Cal. 123. A party is entitled to have the jury instructed upon the law of the case as made by the testimony, if it is not contradicted. *Sperry v. Spaulding*, 45 Cal. 544. A judgment will not be reversed on account of erroneous instructions, when it is apparent that the verdict would have been the same with correct instructions. *Green v. Ophir C. S. & G. M. Co.*, 45 Cal. 522.

REFUSAL OF INSTRUCTIONS.—It is not error for the Court to refuse instructions to the jury upon propositions of law having no reference to any evidence introduced. *Bowen v. Cherokee Bob*, 45 Cal. 495. Where an instruction asked has already been given it is not error to refuse it, but in a criminal case the better course is to give it. *People v. Murray*, 41 Cal. 66. If the Court in its instructions states the law of the whole case fully and fairly, it is not error to reject instructions asked by counsel repeating the law in other language. *Conroy v. Duane*, 45 Cal. 597. As to abandonment, see *Sweeney v. Reilly*, 42 Cal. 407; Breach of promise of marriage, *Powers v. Wheatley*, 45 Cal. 113.

624. A verdict or decision is the determination of an issue of fact. *Harris v. S. F. Sug. Ref.*, 41 Cal. 404. The jury have no right to find a fact in favor of a party which is contrary to or inconsistent with the pleadings. *Tevis v. Hicks*, 41 Cal. 123.

626. In an action against the maker and endorser of a promissory note, if the counter-claim exceeds the amount due on the note, can judgment be rendered against the plaintiff for the balance; Query? *Curtis v. Sprague*, 41 Cal. 59.

**627.** In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and if so instructed, the value of specific portions thereof, and may at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

Verdict in actions for specific personal property.

**631.** Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or, for the recovery of specific real or personal property, with or without damages, and with the assent of the Court, in other actions, in manner following:

Trial by jury when and how waived.

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, in open Court, entered in the minutes.

**632.** Upon the trial of a question of fact by the Court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.

Decision of court on question of fact, when to be filed.

Right of party to written findings, if properly requested. *Polhemus v. Carpenter*, 42 Cal. 382. *Gates v. Salmon*, July. T. 1873. The provisions of the act are merely directory as to time of filing findings, and as to the order of filing in relation to entry of judgment. *Polhemus v. Carpenter*, 42 Cal. 382. *Broad v. Murray*, 44 Cal. 229. It is not error to refuse to file written findings when no request therefor was entered in the minutes of the Court at the time of the submission of the cause, although the attorney verbally requested that written findings be filed. *San Jose v. Shaw*, 45 Cal. 178. Findings by the Court should be mere statements of the ultimate facts in controversy, and the legal consequences from the facts, and should not include probative facts or reasons for the decision. *Mathews v. Kensell*, 41 Cal. 504. Where on a question of ratification of a note, the findings embraced several facts tending to establish it, and then a conclusion from them that there had been a full ratification and confirmation; *Held*, that such





conclusion was the ultimate fact to be ascertained, but that it was none the less a finding of fact because stated as a conclusion. *Jones v. Clark*, 42 Cal. 183. Where findings instead of stating facts involved in the issues, contained only general conclusions, and afforded no information as to the particular facts considered by the Court as established; *Held*, manifestly defective, and, a refusal to amend them on proper application, was error. *Polhemus v. Carpenter*, 42 Cal. 379.

635. A finding is useless and idle, unless the facts found are within the issues; and a judgment based upon such finding cannot be sustained. *Morenhout v. Barrow*, 42 Cal. 593. A finding by the Court, without the issues made, is unnecessary, and is not conclusive on the parties in another action in which the question upon which the finding is made is in issue. *Phelan v. Gardner*, 43 Cal. 307.

Findings,  
how pre-  
pared.

635. At the time the cause is submitted, the judge may direct either or both of the parties to prepare findings of facts, unless they have been waived; and when so directed, the party must within two days prepare and serve upon his adversary, and submit to the judge such findings, and may within two days thereafter, briefly suggest in writing to the judge why he desires findings upon the points included within the findings prepared by himself, or why he objects to findings upon the points included within the findings prepared by his adversary. The judge may adopt, modify, or reject the findings so submitted. If at the time of the submission of the cause, the judge does not direct the preparation of findings, or those prepared are rejected, than he must himself prepare the findings.

If the findings of the Court omit material facts in the cause, it is the duty of the Court to supply the omissions, when its attention is called to the subject, by proper exception to the findings. *Logan v. Halle*, 42 Cal. 645. When a finding of fact was supported by the testimony of only one witness and his testimony, besides being open to suspicion on other grounds, was directly contradicted by the stipulation of the parties attached to the statement; *Held*, that such finding was against evidence. *Walsh v. Hill*, 41 Cal. 571. Presumptions as to findings, see generally: *Moyes v. Griffith*, 35 Cal. 556; *Shelby v. Houston*, 38 Cal. 410; *City of Oakland v. Whipple*, 39 Cal. 112; *Smith v. Cushing*, 41 Cal. 97; *Lovell v. Frost*, 44 Cal. 471. Where additional findings were asked for, in the way of exceptions to findings, and such additions were either upon immaterial points, or probative facts merely; they were properly refused. *Jones v. Clark*, 42 Cal. 183.

**639.** If a collateral matter, not raised by the pleadings, be sent to a referee, under the second and third subdivisions of this section, a motion for a new trial is not necessary to bring the action of the referee before the Court for review, his finding is not binding on the Court till adopted. *Harris v. S. F. Sugar Ref.* 41 Cal. 405.

**643.** Practice on finding of referee on collateral questions not in issue in pleadings. *Harris v. S. F. S. R.*, 41 Cal. 405.

**644.** When a cause, has, by stipulation of the parties, been referred to a referee, and he reports a judgment which is entered, and the Court grants a new trial, it cannot, without a new consent of the parties, again refer the case to the same, or any other referee. Upon the report of the referee, and the entry of the judgment, the stipulation ceased to have further effect. *Daverkosen v. Kelley*, 43 Cal. 477. Where a referee reports his decision upon the whole case, his report stands as the decision of the Court; when he reports facts only, his report is a special verdict. *Harris v. S. F. S. R.* 41 Cal. 393. The finding of a referee on a collateral question does not take the place of a special verdict, and is not binding on the Court till adopted by it. *Id.*

**645.** If a referee tries a question of fact raised by the pleading, the Court cannot review his action of such issues, unless a motion is made for a new trial. *Harris v. S. F. S. R.* 41 Cal. 393.

**646.** An exception is an objection upon a matter of law to a decision of a Court, Judge, or referee in an action or proceeding, and may be taken by either party to any decision made either before or after judgment: and except as provided in the following section, it must be taken at the time the decision is made.

Exceptions  
when to be  
taken.

No exception shall be regarded unless the exception be material, and affect the substantial rights of the parties. *King v. Blood*, 41 Cal. 317. An order made after judgment, unless founded upon affidavits, can be reviewed only by statement on appeal, and in no case by bill of exceptions. The Code of Civil Procedure, enacted in 1872, changes the foregoing rule only as to proceedings subsequent to the taking effect of the Code. *Caulfield v. Doe*, 45 Cal. 22. When a party procures the Court to give to the jury an instruction, which contains legal propositions, it is sufficient for the opposite party to except generally to the instruction, without specifying what part of it is objectionable, but an exception to the charge given by the Court of its own motion, must specify the proposition which is deemed objectionable. *Shea v. P. & B. R. R. Co.*, 44 Cal. 414. An exception taken to instructions given by the Court to the jury, need not state the points of the exception. It is sufficient to say, generally, in the statement that counsel excepted to each and all of the instructions. *McCreery v. Everding*, 44 Cal. 246.







Bill of exceptions,  
preparation  
and settle-  
ment of.

**650.** When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the Court in which the action is pending, or a Judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such service, the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the Judge who tried or heard the case, upon five days notice to the adverse party, or be delivered to the clerk of the Court for the Judge. When received by the clerk, he must immediately deliver them to the Judge, if he be in the county; if he be absent from the county, and either party desire the papers to be forwarded to the Judge, the clerk must, upon notice in writing of such party, immediately forward them by mail, or other safe channel; if not thus forwarded, the clerk must deliver them to the Judge immediately after his return to the county. When received from the clerk, the Judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated, the Judge must settle the bill. If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the Judge or referee, for settlement without notice to the adverse party. It is the duty of

Action  
before  
referee.

the Judge or referee, in settling the bill, to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible. When settled, the bill must be signed by the Judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.

**651.** Exceptions to any decision made after judgment may be presented to the Judge at the time of such decision, and be settled or noted, as provided in §649, and a bill thereof may be presented and settled afterwards, as provided in §650, and within like periods after entry of the order, upon appeal, from which such decision is reviewable. Exceptions after judgment, etc.

**656.** The practice prescribed as to the granting of new trials, is applicable to the review of decrees rendered in proceedings on partition. *Tormey v. Allen*, 45 Cal. 121; *Regan v. McMahon*. 43 Cal. 625.

**657.** Applicable to proceedings on partition. *Regan v. McMahon*, 43 Cal. 625; *Tormey v. Allen*, 45 Cal. 121. Generally, an objection to a recovery against the estate of a deceased person, on the ground that the claim was not presented for allowance cannot be made for the first time on motion for a new trial. *Bank of Stockton v. Howland*, 42 Cal. 129. It is no ground for a new trial in a criminal case, that on a challenge of a juror for actual bias, one of the triers appointed, is on the panel of the jury in attendance in the case. *People v. Voll*, 43 Cal. 166.

**MISCONDUCT OF JURY.**—The retirement of a jury for a necessary purpose for a few moments, with the permission of the Sheriff, out of his sight, there being no evidence that during such retirement they communicated with any one, or with each other, but positive proof to the contrary, is not sufficient ground upon which to grant a new trial. *People v. Moore*, 41 Cal. 238.

**SURPRISE.**—See *Armstrong v. Davis*, 41 Cal. 494.

**NEWLY DISCOVERED EVIDENCE.**—Sufficient to support a motion for new trial considered. *Armstrong v. Davis*, 41 Cal. 494. When, in ejectment, the parties claim title derived from a common source, and the defendant, to show his title the oldest, relies on a purchase made, and a note given for part of the purchase money and a bond for a conveyance, executed to him by the common grantor, which bond is claimed to be lost, and proves that it was the grantor's custom to give a bond when credit was given, and the plaintiff recovers judgment, a subsequent discovery of the note is sufficient ground on which to grant a new trial. *Jones v. Singleton*, 45 Cal. 92.





**EXCESSIVE DAMAGES.**—Objections to the form of verdict, or that excessive damages were thereby awarded, can be made available only on motion for new trial, or on appeal from order denying a new trial. *Campbell v. Jones*, 41 Cal. 515.

On what  
papers  
moved.

**658.** When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it must be made upon affidavits; for any other cause it may be made, at the option of the moving party, either upon the minutes of the Court, or a bill of exceptions, or a statement of the case, prepared as hereinafter provided.

**AFFIDAVITS.**—When an application for new trial is made on affidavits, the affidavits used on hearing of the motion must be identified by the indorsement of the Judge or clerk, made at the time of the hearing, as having been read or referred to in the argument. The ordinary indorsement of filing by the clerk is not sufficient. *Johnson v. Muir*, 43 Cal. 542. The affidavits must be made part of the record by being identified as having been used on the hearing of the motion. *Leszinsky v. White*, 45 Cal. 278. Time in which affidavits to be filed. *Bornheimer v. Baldwin*, 42 Cal. 32.

**STATEMENT.**—The appellant from an order denying a new trial cannot avail himself of an error appearing in the statement, unless he mentions it in his specifications of reasons why a new trial should be granted. *Lucas v. City of Marysville*, 44 Cal. 210. When a nonsuit is granted, and the plaintiff makes a statement on a motion for a new trial, in the specification of reasons why a new trial should be granted, he must assert the alleged error of granting a nonsuit. *McCreery v. Everding*, 44 Cal. 284. It is sufficient in the specification made in the statement of reasons why a new trial should be granted, to assign errors in law occurring by "giving of each of the instructions asked by the defendants." Such specification sufficiently points out the particular errors in the instructions relied on. *McCreery v. Everding*, 44 Cal. 284. On a motion for new trial the general ground of insufficiency of the evidence to justify the findings is of no avail unless there are proper specification of particulars, wherein it is insufficient. *Foote v. Richmond*, 42 Cal. 443. Specification of grounds of motion required in statement. *People v. C. P. R. R. Co.*, 43 Cal. 423; *Donahue v. Gallavan*, 43 Cal. 576.

The specification of reasons why a new trial should be granted to be made in the statement, is not a general one of errors, in admitting or excluding the evidence, but a particular specification, and a pointing out and reference to each alleged error. *People v. C. P. R. R. Co.* 43 Cal. 403. Statement, miscalled "Statement on Appeal," when manifestly intended as a statement on new trial, will be regarded as such. *Morris v. Angle*, 42 Cal. 237.

**659.** The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the Court or referee, if the action were tried without a jury, file with the clerk, and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the Court, or a bill of exceptions, or a statement of the case;

Notice of intention, when to be filed and what to contain.

1. If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the Court in which the action is pending, or a Judge thereof may allow, file such affidavit with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter affidavits, a copy of which must be served upon the moving party.

On affidavits.

2. If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions, as is provided after the entry of judgment, or after receiving notice of such entry by §650, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion;

On bill of exceptions.

3. If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the Judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same, or a copy thereof, upon the moving party. If the amend-

On statement.







ments be adopted, the statement shall be amended accordingly, and then presented to the Judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the Judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the Judge, upon five days notice to the adverse party, or delivered to the clerk of the court for the Judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk, and Judge, as are required for the settlement of bills of exception by §650. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or, if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee, for settlement, without notice to the adverse party. When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion. It is the duty of the Judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the Judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.

On minutes  
of court.

4. When the motion is to be made upon the minutes

of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied.

**NOTICE OF MOTION FOR NEW TRIAL**, on confirmation of report of referee, when to be given. *Harris v. S. F. S. R.*, 41 Cal. 393. If, after the findings of fact are filed, a notice of motion for a new trial is given, before the service of notice of filing such findings, notice of such filing is rendered unnecessary. *Cottle v. Leitch*, 43 Cal. 321. Time to move for new trial, when no findings asked. *Polhemus v. Carpenter*, 42 Cal. 377. Time when findings were duly requested. *Id.* The right to give notice of intention is lost, when the right to move for a new trial is lost, and the right cannot be restored by an order of Court. *Cottle v. Leitch*, 43 Cal. 321. When notice of intention is not given to the adverse party, nor waived by appearance or otherwise, an order denying the new trial cannot be renewed on appeal. *Wright v. Snowball*, 45 Cal. 654.

**EXTENDING TIME**.—An order extending time to prepare and file motion for a new trial, extends the time to prepare and file notice of motion for new trial. *Cottle v. Leitch*, 43 Cal. 321.

**WAIVER OF NOTICE**.—Proposing amendments to a statement on motion for a new trial, is a waiver of a failure to serve a notice of the motion, unless the party proposing the amendments make the objection or reserves his right to make it when he proposes his amendments. *Brundage v. Adams*, 41 Cal. 619. Stipulation as to statement. *McCreery v. Everding*, 44 Cal. 246. If a party who does not give notice of motion files a statement and the opposite party settles the statement, or files amendments, and the statement is settled without reserving his right to object for want of notice, he waives the notice. *Hobbs v. Duff*, 43 Cal. 487 ; *Cottle v. Leitch*, 43 Cal. 321.

**660.** The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the Court, and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party. On such hearing reference may be had

Motion,  
when to  
be heard.





in all cases to the pleadings and orders of the Court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file.

**MOTION WAIVED.**—Motion waived by failure to file statement in time. *Campbell v. Jones*, 41 Cal. 515; *Cottle v. Leitch*, 43 Cal. 321.

**MOTION MUST BE SUBMITTED.**—Even if the statement has been settled, engrossed and certified, and filed as correct, the Court should not pass on the motion for a new trial until it has been submitted for decision and the parties afforded an opportunity to be heard, if desired. *Morris v. De Celis*, 41 Cal. 331; *De Gaze v. Lynch*, 42 Cal. 363. Where the motion was granted without any formal or actual submission of the motion, and without any notice so as to give the plaintiff an opportunity to be heard; *held*, error. *De Gaze v. Lynch*, 42 Cal. 363. If a motion for new trial is decided by the Court before it has been submitted, the order denying or granting the new trial should be set aside as improvidently made, if application is made therefor. *Morris v. De Celis*, 41 Cal. 331. Where a Court, through its own inadvertence, has prematurely made an order granting a new trial before the final submission of the motion, it is the duty of the Court to vacate the order so made. *Hall v. Polack*, 42 Cal. 219. The order made on application in due form is conclusive so far as the Court making it is concerned. *Coombs v. Hibberd*, 43 Cal. 453.

**DECISION ON MOTION.**—The Court should not decide a motion for new trial before the statement, as settled, has been engrossed and certified as correct. *Morris v. DeCelis*, 41 Cal. 331. It is the duty of the Court to settle a proposed statement in all cases where the attorneys are unable to agree to it as filed, no matter what reasons exist, which render them unable to agree. *Lucas v. City of Marysville*, 44 Cal. 210. Parties may stipulate that the Court pass on a motion, before the statement is engrossed, and the engrossed statement agreed to or certified as correct. *Thompson v. Connolly*, 43 Cal. 637. Order striking out statement from files, erroneous. *Calderwood v. Peyser*, 42 Cal. 111.

**MOTION, WHEN GRANTED.**—When findings are wholly unsupported by the evidence, it is the duty of the Court to set them aside, and grant a new trial. *Moss v. Atkinson*, 44 Cal. 3. The granting of a new trial on the ground that the verdict was against the admissions of the defendant who was called as a witness, is a decision that the evidence was insufficient to justify the verdict. *Lorenzana v. Camarillo*, 41 Cal. 467. If the plaintiff in ejectment relied on a paper title, and recovers judgment, and after the trial, the defendant discovers that prior to the commencement of the action, the plaintiff had conveyed the title to a third person, a new trial should be granted. *Cranman v. Porter*, 41 Cal. 462.

**MOTION, WHEN DENIED.**—A new trial will not be granted by reason of

an error which does the moving party no harm. *Gambert v. Hart*, 44 Cal. 542. Where the verdict is a general one, and there is sufficient evidence to justify the verdict on one of the issues, the verdict will not be set aside. *Crosett v. Whelan*, 44 Cal. 200. A new trial will not be granted on the ground of newly discovered evidence, if the same is cumulative, or, if with proper diligence, it might have been procured, on the former trial. *Russell v. Denison*, 45 Cal. 337. Or, if it is in conflict with the evidence given on the trial. *People v. McCauley*, 45 Cal. 146. A verdict will not be disturbed as against evidence, where there is a substantial conflict of evidence. *Scoles v. U. S. Ins. Co.*, 42 Cal. 524; *Livermore v. Stine*, 43 Cal. 275; *Price v. Sturgis*, 44 Cal. 591.

**DISMISSAL OF MOTION.**—Order of dismissal of motion for lack of diligence in its prosecution is in discretion of Court. *Hopkins v. W. P. R. B. Co.* 44 Cal. 389. What constitutes sufficient diligence. *Jones v. Singleton*, 45 Cal. 92; *Simmons v. Goin*, 45 Cal. 669.

**MISCELLANEOUS.**—In a suit for mandamus, brought in the Supreme Court, where questions of fact are referred to a District Court, a motion for a new trial must be made in the Supreme Court. *People v. Holloway*, 41 Cal. 409. An action for partition of real estate is within the operation of the statute governing new trials. *Tormey v. Allen*, 45 Cal. 119, citing *Regan v. McMahon*, 43 Cal. 625.

**661.** The judgment roll and the affidavits, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the Court, and in that case the judgment roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal. Such subsequent statement shall be proposed by the party appealing, or intending to appeal, within ten days after the entry of the order, or such further time as the Court in which the action is pending, or a Judge thereof, may allow, and the same or a copy thereof be served upon the adverse party, who shall have ten days thereafter to prepare amendments thereto, and serve the same, or a copy thereof, upon the party appealing, or intending to appeal; and thereafter proceedings shall be had, and within like periods, for the settlement of the statement, as provided by §659, but the statement shall only contain the grounds argued before the Court for a new trial,

What constitutes record to be used on appeal.

Subsequent statement.







and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the Judge to exclude all other evidence or matter from the statement.

New trial by  
order of  
court.

**662.** (N. S.) The verdict of a jury may also be vacated, and a new trial granted by the Court, in which the action is pending, on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the Court, or the evidence in the case, as to satisfy the Court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice. The order of the Court may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a statement to be used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the Court, as provided in §661.

Order how  
reviewed.

Motion,  
where may  
be heard.

**663.** When the action is tried by a District Judge in his district, out of the county of his residence, the motion for a new trial may, upon the consent of parties, be brought to a hearing before such Judge at chambers, or in open Court, in the county of his residence, or in any other county.

**666.** Judgment for defendant for excess in case of a counter claim. *Curtis v. Sprague*, 41 Cal. 59.

**667.** In replevin where the judgment for the plaintiff describes the property to be restored as "buckwheat, valued at three hundred and seventy-five dollars and seventy-five cents," the description is insufficient to sustain the judgment, unless the judgment refer for a fuller description to the complaint, and there is a more definite description in the complaint. *Welch v. Smith*, 45 Cal 230.

Judgment =  
roll, what  
constitutes.

**670.** Immediately after entering the judgment, the Clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of

service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment ;

2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the Court, or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision.

See generally, *Anderson v. Fisk*, 36 Cal. 625 ; *Geary v. Simmons*, 39 Cal. 224 ; *Young v. Rosenbaum*, 39 Cal. 646 ; *Mason v. Wolf*, 40 Cal. 246 ; *McAbee v. Randall*, 40 Cal. 137 ; *N. & S. Canal Co. v. Kidd*, 43 Cal. 184.

671. Immediately after filing the judgment roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him ; and from the time the judgment is docketed, it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The lien continues for two years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, as provided in this Code, in which case the lien of the judgment ceases.

Judgment,  
lien, when  
it begins  
and when it  
expires.

It is not contemplated that there shall be more than one judgment docket in each county. *Gillis v. Barnett*, 38 Cal. 393. Lien of judgment creditor. *Logan v. Hale*, 42 Cal. 645.

675. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or by his indorsement on the face, or on the margin of the record of the judgment, or by the attorney, unless a revocation of his authority is filed.

Satisfaction  
of judgment  
how made.





Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and, upon motion, the Court may compel it, or may order the entry of satisfaction to be made without it.

Although it is a general proposition that a levy under an execution, upon sufficient personal property to satisfy it, amounts to a satisfaction of the judgment; yet, such is not the case as to the debtor, if he consents to an application of the proceeds of sale to junior executions. *Barber v. Reynolds*, 44 Cal. 520. Satisfaction of judgment by waiving its rights to proceeds of sale. *Id.*

681. If an execution is issued by the County Clerk on a judgment rendered by a Justice after a transcript of the judgment is filed with the Clerk, what Court has authority to entertain a motion to quash it. Query. *Gates v. Lane*, 44 Cal. 392.

Judgment  
what may  
direct—  
Arrest of  
defendant.

684. When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part; when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith; when the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the Court.

688. A Sheriff, under an execution issued on a judgment, which is not a lien, can only seize and sell such title and interest as the judgment debtor had in the land at the time of the levy, and such as he acquired between the time of the levy and the sale. *Kenyon v. Quinn*, 41 Cal. 325. When Sheriff's sale conveys an equitable title. *Id.* Seizure by Sheriff at direction of judgment creditor, when a joint trespass. *Goodyear v. Williston*, 42 Cal. 11.

**690.**—Personal property which is exempt from forced sale on execution, is none the less exempt because the judgment debtor owns an undivided interest in it in common with a stranger to the judgment. *Servanti v. Lusk*, 43 Cal. 238. Where a Sheriff on ascertaining that property which has been attached is exempt from execution, refuses to release it without an undertaking, he exceeds his authority and violates his duty. *Servanti v. Lusk*, 43 Cal. 239.

**691.** The Sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs, must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the Court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the Sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs.

Writ, how  
executed.

**691.** LEVY UPON LAND WHEN IRREGULAR. — When the judgment debtor has, or claims, an interest in only a small, well defined parcel of a much larger tract of land, it is extremely irregular, to say the least, to levy an execution upon his interest in the general tract, instead of the particular parcel he claims. *Logan v. Hale*, 42 Cal. 645.

**692.** Before the sale of the property on execution, notice thereof must be given, as follows:

Notice of  
sale, how  
given.

1. In case of perishable property, by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property;

2. In case of other personal property, by posting a similar notice in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days;

3. In case of real property, by posting a similar notice, particularly describing the property, for twenty







days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one;

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment.

A notice to a Sheriff before he makes a sale, that the premises he is about to sell are the homestead of the party giving such notice, does not render the sale void. Such notice does not create a homestead, nor is it evidence of the existence of a homestead. *Villa v. Pico*, 41 Cal. 469.

694. A purchaser for value at a judicial sale, who is not the judgment creditor, without notice of extrinsic facts, which are relied upon to impeach the judgment, under which the sale was made, is not affected by such facts. *Reeve v. Kennedy*, 43 Cal. 643. Title acquired by purchaser. *Id.* One who takes an assignment of an erroneous judgment, and procures an execution to be issued upon it, and becomes purchaser of the land sold under the execution, is not entitled to protection as a bona fide purchaser, and is liable in an action for damages caused by the sale. *Reynolds v. Hosmer*, 45 Cal. 616. If a judgment for a tax enforces a lien on real estate, not only for the tax on the land, but also for the owner's tax on personal property, and the latter is erroneous, a sale made under the judgment is not void, nor can it for that reason be impeached in an action brought to set it aside. *Reeve v. Kennedy*, 43 Cal. 643. The principles applicable to other judicial sales, are applicable to sales under judgments enforcing liens for taxes. *Jones v. Gillis*, 45 Cal. 541.

Proceedings  
on refusal  
of pur-  
chaser  
to pay  
purchase  
money.

695. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction.

When sher-  
iff may  
refuse bid.

696. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such person.

**702.** A Sheriff's deed of real estate, executed under an execution sale, if made before the time for redemption expires, is void. *Hall v. Yoell*, 45 Cal. 584. A Sheriff's deed does not convey after acquired interest. *Emerson v. Sansome*, 41 Cal. 552. The Act concerning transfers (Civil Code, Section 1106) which provides that a conveyance of land in fee simple absolute shall convey after acquired legal estate has no application to Sheriff's deeds made on execution sale. *Kenyon v. Quinn*, 41 Cal. 325. A redemptioner may exercise his right to redeem land sold on execution if no redemption has been made by the judgment debtor, at any time during the six months after the sale; and if in sixty days thereafter there is no redemption from him, the right to redeem from him is gone, even as to the judgment debtor, and he is entitled to a Sheriff's deed. *Boyle v. Dalton*, 44 Cal. 332.

**703.** If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the Sheriff, and a duplicate filed with the Recorder of the county; and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the Sheriff, and filed with the Recorder; and if such

When judgment debtor or other redemptioner may redeem.

Notice of redemption.





Sheriff's  
deed.

notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a Sheriff's deed; but in all cases the judgment debtor shall have the entire period of six months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the Recorder of the county in which the property is situated, and the Recorder must note the record thereof in the margin of the record of the certificate of sale.

See generally : *Boyle v. Dalton*, 44 Cal. 334.

**714.** Statutory proceedings, by which the judgment debtor is required to appear before the Court or a referee to answer concerning his property, are but a substitute for a creditor's bill at common law. *McCullough v. Clark*, 41 Cal. 302.

**726.** In an action to foreclose a mortgage a subsequent incumbrancer under the junior mortgage is a proper party, and is entitled to have his rights protected by an appropriate provision in the decree as to the disposition of the surplus of the proceeds of the sale, if there be any, after satisfying the demands of the senior mortgagee. *Ward v. McNaughton*, 43 Cal. 161. A mortgage is merged in the decree of foreclosure, and a party who enters under the decree cannot be regarded as a mortgagee in possession. *Davenport v. Turpin*, 43 Cal. 597.

Effect of sale on foreclosure. *Davenport v. Turpin*, 41 Cal. 100. Legal title not divested by sale. *Id.* Persons claiming title to real estate under sheriff's sales, which passed no title, are not necessary or proper parties defendant in an action to enforce a mortgage on the

same real estate, made before the sheriff's sales took place. *Hall v. Yoell*, 45 Cal. 584. When the family residence, mortgaged before the husband's death, is set apart after his death for the use of the widow and family, the administrator is not a necessary party to the foreclosure of the mortgage; provided no personal claim is made against the estate. *Schadt v. Heppe*, 45 Cal. 433.

**728.** When an installment mortgage is given, a judgment enforcing the lien of the mortgage for one installment is not a bar to another action to enforce the lien for another installment, subsequently falling due. *McDougal v. Downey*, 45 Cal. 165. This section does not apply to a case where an installment, secured by the mortgage, falls due after it has been enforced for an installment due at an earlier date. *Id.*

**731.** The obstruction of a public highway is a common nuisance. *L. T. Co. v. S. & W. W. R. Co.*, 41 Cal. 562. A private individual cannot maintain an action to prevent or abate a nuisance caused by obstructing a public highway, unless he shows some special damage to him, in addition to that received by the public. *Aram v. Schallanberger*, 41 Cal. 449; *L. T. Co. v. S. & W. W. R. Co.*, 41 Cal. 562. To maintain an action for such damage it must be such as might legitimately flow from the nuisance. *Id.* Where the person injured may have his action to abate a nuisance, he is not limited to that remedy, but may sue to recover damages. *Will v. Sinkwitz*, 41 Cal. 588. When party not liable in damages for injury done to land by overflow of water. *Mathews v. Kinsell*, 41 Cal. 512.

**738.** What constitutes a cloud on title. *Lick v. Ray*, 43 Cal. 83. Circumstances authorizing relief. *Id.* Immaterial circumstances. *Cohen v. Sharp*, 44 Cal. 29. One who by collusion with a tenant acquires possession of the leased premises, has such a possession as enables him to maintain an action to quiet title. *Calderwood v. Brooks*, 45 Cal. 519. See, generally: *Walsworth v. Johnson*, 41 Cal. 62; *Wood v. Ramond*, 42 Cal. 644; *Logan v. Hale*, 42 Cal. 649; *Lick v. Ray*, 43 Cal. 86; *Altshul v. S. F. C. P. H. A.*, 43 Cal. 173; *Byers v. Neal*, 43 Cal. 215.

**748.** No distinction is made between the effect of a "custom" or "usage," the proof of which must rest in parol, and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse, or is generally disregarded. *Harvey v. Ryan*, 42 Cal. 628.

**755.** Immediately after filing the complaint in the District Court, the plaintiff must record in the office of the Recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties

Plaintiff  
must file  
notice of  
pendency of  
action.







so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action.

Partition must be made according to the rights of the parties, as determined by the court.

**764.** In making the partition the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties, as determined by the Court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. Before making partition or sale; the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties, or sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs or assigns, in which case it shall remain such private way.

**766.** Judgment in partition. *Regan v. MacMahon*, 41 Cal. 679. Appeal from interlocutory decree in partition. *Id.*

Conveyances must be recorded and will be a bar against parties.

**787.** The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

Costs of partition a lien upon the shares of the parceners.

**796.** The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in

in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the Court may require the expense of such litigation to be paid by the parties thereto, or any of them.

798 of said Code is repealed.

810. (N. S.) When the action is brought upon the information or application of a private party, the Attorney-general may require such party to enter into an undertaking, with sureties to be approved by the Attorney-general, conditioned that such party, or the sureties, will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

Undertaking, when required in actions for usurpation.

813. All steamers, vessels and boats are liable :

When vessels, etc., are liable.

1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees ;

2. For supplies furnished in this State for their use, at the request of their respective owners, masters, agents, or consignees ;

Their liabilities constitute liens.

3. For work done or materials furnished in this State for their construction, repair, or equipment ;

4. For their wharfage and anchorage within this State ;

5. For non-performance, or mal-performance, of any contract for the transportation of persons or property between places within this State, made by their respective owners, masters, agents, or consignees ;

6. For injuries committed by them to persons or property, in this State.

Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority





in their order herein enumerated, and have preference over all other demands ; but such liens only continue in force for the period of one year from the time the cause of action accrued.

When jurisdiction as to maritime contract is exclusive in Federal courts. *Crawford v. bark Caroline Reed*, 42 Cal. 472.

Parties,  
defendants  
in actions.

814. Actions for any of the causes specified in the preceding section, must be brought against the owners by name, if known, but if not known, that fact shall be stated in the complaint, and the defendant shall be designated as unknown owners. Other persons having a lien upon the vessel may be made defendants in the action, the nature and amount of such lien being stated in the complaint.

Summons,  
on whom  
served.

816. The summons, attached to a certified copy of the complaint, must be served on the owners, if they can be found; otherwise, it may be served on the master, mate, or person having charge of the steamer, vessel, or boat.

Plaintiff  
may have  
vessel, etc.,  
attached.

817. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the steamer, vessel, or boat, with its tackle, apparel and furniture, attached as security for the satisfaction of any judgment that may be recovered in the action.

The clerk  
must issue  
the writ of  
attachment.

818. The clerk of the Court must issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if the judgment be rendered in favor of the owner of the steamer, vessel or boat, as the case may be, he will pay all costs and damages that may be awarded against him, or all damages that may be sustained by him from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars.

**819.** The writ must be directed to the Sheriff of the county within which the steamer, vessel or boat lies, and direct him to attach such steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in his custody until discharged in due course of law.

Such writ must be directed to the sheriff.

**820.** The Sheriff to whom the writ is directed and delivered, must execute it without delay, and must attach and keep in his custody the steamer, vessel or boat named therein, with its tackle, apparel and furniture, until discharged in due course of law; but the Sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel or boat, or with the removal of any trunks or other property of passengers, or of the captain, mate, seaman, steward, cook, or other persons employed on board.

Sheriff must execute such writ without delay.

**821.** The owner, or the master, agent or consignee of the steamer, vessel or boat, may, on behalf of the owner, appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on behalf of the plaintiff, and may require sureties to justify, as upon bail or arrest.

Who may appear and defend action.

**822.** After the attachment is levied, the owner, or the master, agent or consignee of the steamer, vessel or boat, may, in behalf of the owner, have the attachment discharged, upon giving to the Sheriff an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, besides costs, or depositing that amount with the Sheriff. Upon receiving such undertaking or amount, the Sheriff must restore to the owner, or the master, agent or consignee of the owner, the steamer, vessel or boat attached.

Discharge of attachment, how procured.

**823.** After the appearance in the action of the owner, the attachment may, on motion, also be discharged in the same manner, and on like terms and conditions, as attachments in other cases, subject to the provisions of §825.

After appearance, may be discharged on motion.







When not discharged such vessel, etc., may be sold at public auction.

**824.** If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the Sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:

1. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel or boat sold, to the payment of the amount of such wages, as specified in the execution;

2. To the payment of the judgment and costs, including his fees;

3. He must pay any balance remaining to the owner, or to the master, agent or consignee who may have appeared on behalf of the owner; or, if there be no appearance, then into Court, subject to the claim of any party or parties legally entitled thereto.

Proof of the claims of mariners and others.

**826.** If the claim of the mariner, boatman, or other person, filed with the Clerk of the Court, as provided in the last section, be not contested within five days after filing of the notice thereof, by the owner, master, agent or consignee of the steamer, vessel or boat against which the claim is filed, or by any creditor, it shall be deemed admitted; but if contested, the clerk must indorse upon the affidavit thereof a statement that it is contested and the grounds of the contest, and must immediately thereafter order the matter to a single referee for his determination; or he may hear the proofs and determine the matter himself. The judgment of the clerk or referee may be reviewed by a Court in which the action is pending, or a Judge thereof, either in term or vacation, immediately after the same is given, and the judgment of the Court or Judge shall be final. On the review, the Court or Judge may use the minutes of the proofs taken by the clerk or referee, or may take the proofs anew.

**832.** Actions in Justices' Courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried: Actions, in what township or city may be commenced.

1. If there be no Justices' Courts for the township or city in which the defendant resides: in any city or township of the county in which he resides;

2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties: in the township or city in which any of the persons liable may reside;

**843.** When an infant is a party, he must appear either by his general guardian, if he have one, or by a guardian appointed by the Justice as follows: Infant to appear by guardian.

1. If the infant be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, upon the application of a relative or friend;

2. If the infant be defendant, the guardian must be appointed at the time the summons is returned, or before the answer. It is the right of the infant to nominate his own guardian, if the infant be over fourteen years of age; otherwise the Justice must make the appointment.

**845.** The time specified in the summons for the appearance of the defendant must be as follows: Time for appearance of defendant.

1. If an order of arrest is indorsed upon the summons, forthwith;

2. If the defendant is not a resident of the county in which the action is brought, not less than twenty nor more than thirty days from its date;

3. In all other cases, not less than three nor more than twelve days from its date. (In effect May 27, 1874.)





Summons,  
limitations  
on service  
of.

848. The summons cannot be served out of the county of the Justice before whom the action is brought, except where the action is brought upon a joint contract or obligation of two or more persons who reside in different counties, and the summons has been served upon the defendant resident of the county, in which case the summons may be served upon the other defendants out of the county; and, except also, when an action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides. When the defendant resides in the county, the summons cannot be served within two days of the time fixed for the appearance of the defendant: when he resides out of the county, and the summons is served out of the county, the summons cannot be served within twenty days of such time.

Summons,  
by whom  
and how  
served.

849. The summons may be served by a Sheriff or constable of any of the counties of this State ; *provided*, that when a summons, issued by a Justice of the Peace, is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the County Clerk of such county, to the effect that the person issuing the same was an acting Justice of the Peace at the date of the summons, or the summons may be served by any male resident, over the age of twenty-one years, not a party to the suit, within the county where the action is brought, and must be served and returned, as provided in Title V, Part II, of this Code, or it may be served by publication ; and §§ 413 and 412, so far as they relate to the publication of summons, are made applicable to Justices' Courts ; the word "Justice" being substituted for the word "Judge," whenever the latter word occurs. (In effect May 27th, 1874.)

**862.** Before an order for an arrest can be made, the party applying must prove to the satisfaction of the Justice by the affidavit of himself, or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the Justice a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

Affidavit  
and under-  
taking for  
order of  
arrest.

**891.** The Justice upon receiving the verdict is required by statute to immediately render judgment accordingly. *Lynch v. Kelly*, 41 Cal. 233.

**892.** See *Lynch v. Kelly*, 41 Cal. 233.

**893.** The judgment in Justices' Courts must be entered substantially in the form required by this Code. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject must be stated in the judgment.

Judgment,  
how entered  
when de-  
fendant  
subject to  
arrest.

**911.** Every Justice must keep a book, denominated a "Docket," in which he must enter :

Docket,  
what to  
contain.

1. The title of every action or proceeding :
2. The object of the action or proceeding ; and if a sum of money be claimed, the amount thereof ;
3. The date of the summons, and the time of its return ; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact ;
4. The time when the parties, or either of them, appear, or their non-appearance, if default be made ; a minute of the pleadings and motions ; if in writing, referring to them : if not in writing, a concise statement of the material parts of the pleading ;







5. Every adjournment, stating on whose application and to what time ;

6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial ;

7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request ;

8. The verdict of the jury, and when received ; if the jury disagree and are discharged, the fact of such disagreement and discharge ;

9. The judgment of the Court, specifying the costs included and the time when rendered ;

10. The issuing of the execution, when issued and to whom ; the renewals thereof, if any, and when made, and a statement of any money paid to the Justice, when and by whom ;

11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

(costs in  
Justices'  
courts.

924. The prevailing party in Justices' Courts is entitled to costs of the action and also of any proceedings taken by him in aid of an execution, issued upon any judgment recovered therein.

936. RIGHT OF APPEAL.—Doubtful claims affecting the right of appeal, should be liberally construed in favor of the right. *San Francisco v. Certain Real Estate*, 42 Cal. 519. A failure to perfect a first appeal will not defeat a second appeal properly taken. *Bornheimer v. Baldwin*, 42 Cal. 27. A stranger to the records cannot appeal from an order granting a writ of assistance. *People v. Grant*, 45 Cal. 97. The rule, that one affected by an order regularly entered, which is the subject of an appeal, must assail it by an appeal, and not by application to set it aside, does not apply to an ex-parte order obtained by an intruder who was not a party to the action. *San José v. Fulton*, 45 Cal. 316.

WHEN APPEAL LIES.—An appeal lies from an order refusing to vacate an order granting a writ of assistance. *San Jose v. Falton*, 45 Cal. 316. An order on a motion to retax costs, if made after entry of judgment, is a special order made after final judgment, from which an appeal lies. *Dooly v. Norton*, 41 Cal. 439. An appeal may be taken from an order made after judgment striking a statement on motion for new trial from the files. *Calderwood v. Peyser*, 42 Cal. 111.

**WHEN APPEAL DOES NOT LIE.**—An order made in a cause refusing to try the same, is not a judgment from which an appeal will lie. *People v. De La Guerra*, 43 Cal. 227. An order of Court adjudging a party guilty of contempt is not appealable. *Aram v. Shallenberger*, 42 Cal. 277. The findings and conclusions of law do not constitute an order which is subject of an appeal. *Thompson v. Lynch*, 43 Cal. 482. The confirmation of the report of a referee, and an order that judgment be entered for plaintiff without annunciation of judgment upon the facts found and a determination of the particular relief to which plaintiff is entitled, is not the rendition of a judgment from which an appeal lies. *Harris v. S. F. S. R. Co.*, 41 Cal. 393. The action of the trial Court in allowing a challenge to a juror for implied bias, is not open to review. *People v. Murphy*, 45 Cal. 137.

**939. TIME WITHIN WHICH TO APPEAL.**—The time within which to appeal from the judgment, runs from its rendition. *McCourtney v. Fortune*, 42 Cal. 389. The modification of a judgment made as the result of a motion for a new trial, is in effect the rendition of a new judgment, and an appeal may be taken at any time within one year after its rendition. *Mann v. Haley*, 45 Cal. 63. The pendency of an appeal from an order denying a new trial in the same case, will not operate to prolong the time for an appeal from the judgment. *Bornheimer v. Baldwin*, 42 Cal. 27. An appeal from an order denying or granting a new trial, must be taken within sixty days from the time the order was made. *Thompson v. Connolly*, 43 Cal. 636. An order striking a notice of motion for new trial from the files, ceases to be subject of review after sixty days. *Thompson v. Lynch*, 43 Cal. 482.

**940.** An appeal is taken by filing with the Clerk of the Court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the Clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.

Appeal, how taken.

The statute provides no time within which the notice of appeal must be served, except that it must be served before the undertaking on appeal is filed. *Sweeny v. Reilly*, 42 Cal. 405.

**941.** An undertaking on appeal must be filed within five days after the notice of appeal is filed. *Aram v. Shallenberger*, 42 Cal. 277. Compliance with statute as to service and filing of notices and undertakings on appeal, essential. *Id.*





Undertaking on appeal from a money judgment.

942. If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the Supreme Court in the Court from which the appeal is taken, judgment may be entered on motion of the respondent, in his favor against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from, be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties, shall be for such amounts only as in their affidavits, they may state that they are severally worth, and judgment may be entered against the sureties by the Court, from which the appeal is taken, pursuant to the stipulations herein designated. When the judgment or order appealed from, is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking, must be made payable in the same kind of money or currency.

**946.** Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the Court below, upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the Court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from. And the Court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the Court below be sustained; and unless, within five days after the entry of the order appealed from, such appeal be perfected.

Stay of proceedings.

The security on appeal may be limited when appellant is executor, etc.

**948.** The adverse party may except to the sufficiency of the sureties to the undertakings mentioned in sections 941, 942, 943 and 945, at any time within thirty days after the filing of such undertaking; and, unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a Judge of the Court below, a County Judge, or County Clerk, upon five days notice to the respondent, of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this Title, a deposit in the Court below of the amount of the judgment appealed from, and three hundred dollars in addition, is equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

Justification of sureties on undertaking on appeal.







Undertak-  
ings, in  
cases not  
specified.

949. In cases not provided for in sections 942, 943, 944, and 945, the perfecting of an appeal by giving the undertaking, or making the deposit mentioned in §941, stays proceedings in the Court below, upon the judgment or the order appealed from, except where it directs the sale of perishable property; in which case the Court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court. And except also, where it adjudges the defendant guilty of usurping or intruding into, or unlawfully holding a public office, civil or military, within this State. And except also, where the order grants, or refuses to grant, a change of the place of trial of an action. [In effect February 16, 1874.]

What  
papers  
to be used  
on an ap-  
peal from  
the judg-  
ment.

950. On an appeal from a final judgment, the appellant must furnish the Court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the Court, as provided in §661, or any bill of exceptions settled, as provided in §§649 or 650, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial.

TRANSCRIPT.—Errors not specified in the statement will not be considered. *Crosett v. Whelan*, 44 Cal. 200. General specifications of error not sufficient. *Wilson v. Wilson*, 45 Cal. 399. Insufficient specification of error of law. *City of Stockton v. Creanor*, 45 Cal. 247. An order striking out portions of a pleading is no part of the judgment roll, and cannot be renewed, unless supported by a statement. *N. & S. Canal Co. v. Kidd*, 43 Cal. 181; *Feely v. Shirley*, 43 Cal. 369; *Morris v. Angle*, 42 Cal. 237.

RECORD.—The records filed in the Supreme Court are not merely *prima facie*, but are conclusive in their character. *People v. Woods*, 43 Cal. 176. The appeal must be determined on the record. *Rogers v. Tennent*, 45 Cal. 184. Correction of error apparent on record. *Foucault v. Pinet*, 43 Cal. 136.

TRANSCRIPT.—Briefs and Points. *Thomasson v. Wood*, 42 Cal. 417; *Mott v. Reyes*, 45 Cal. 379. The record need not show the service of summons. *Mahoney v. Middleton*, 41 Cal. 41. Record must show

exceptions to rulings of Court. *Russell v. Dennison*, 45 Cal. 337. On appeal for exclusion of testimony, the record should show what the testimony was. *Bornheimer v. Baldwin*, 42 Cal. 27; *People v. McCuslan*, 43 Cal. 55; *People v. Williams*, 45 Cal. 25. Alleged errors in instructions may be considered, in the absence of testimony, if the instructions are incorrect in every conceivable state of the evidence. *People v. Padillia*, 42 Cal. 535.

TRANSCRIPT must show that appeal has been taken. *People v. Phillips*, 45 Cal. 44. The proceedings at the trial should be chronologically arranged. *Vassault v. Edwards*, 43 Cal. 459.

851. On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the Court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the Court below.

What papers used on appeal from judgment rendered on appeal.

952. On an appeal from an order granting or refusing a new trial, the appellant must furnish the Court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section six hundred and sixty-one of this code.

What papers used on appeal from order granting or refusing new trial.

STATEMENT.—On an appeal from an order striking out a notice of motion for new trial, a statement in support of the appeal must be presented. *Wilson v. Dougherty*, 45 Cal. 34. Statement to be annexed to order. *Poole v. Caulfield*, 45 Cal. 107. On an appeal from an order not made on affidavits alone, appellant must bring up the facts in a statement, which must specify the grounds upon which he intends to rely. *Cross v. Zane*, 45 Cal. 89. Statement on motion for new trial, when considered on appeal. *Cardinell v. O'Dowd*, 43 Cal. 586; *Thompson v. Conolly*, 43 Cal. 637. An order denying a motion for judgment on the pleadings, will not be renewed, unless presented by a statement or bill of exceptions. *McAbee v. Randall*, 41 Cal. 136. Review of evidence generally. *Brown v. Brown*, 41 Cal. 88; *McCullough v. Clark*, 41 Cal. 298; *Hall v. Polack*, 42 Cal. 218; *Livermore v. Stine*, 43 Cal. 274; *Hixon v. Brodie*, 45 Cal. 275. An order made after final judgment, unless founded upon affidavits, can be renewed only by statement on appeal, and in no case by bill of exceptions. *Caulfield v. Doe*, 45 Cal. 221.

In a statement on a motion for a new trial, after nonsuit, the decision of the Court should be specified as an error of law. *Donahue v. Gallavan*, 43 Cal. 573. Objections to amount of verdict must be particularly specified. *Livermore v. Stine*, 43 Cal. 275.

RECORD.—An appeal from an order on new trial brings up only so much of the record as concludes with the decision of the





motion itself, and cannot be made to embrace any subsequent order. *Coombs v. Hibberd*, 45 Cal. 174. The record on an appeal from an order must contain a statement annexed to the order. *People v. Doe*, 45 Cal. 43.

Copies and undertakings, how certified.

**953.** The copies provided for in the last three sections must be certified to be correct by the Clerk or the attorneys, and must be accompanied with a certificate of the Clerk or attorneys, that an undertaking on appeal, in due form, has been properly filed, or a stipulation of the parties waiving an undertaking.

**CERTIFICATE TO COPIES OF PAPERS.**—Where a statement has been properly filed, the Clerk's certificate must show that the statement was settled. *Thompson v. Thornton*, 43 Cal. 24. Whether a statement on an appeal from an order, granting or refusing a new trial, would in any case be necessary or proper. Query? *Id.* A certificate is defective, which does not state whether a statement on appeal was filed, or does not show the amount or character of the judgment. Recitals in the undertaking will not be accepted as a substitute for statements, which are required to be contained in the certificate. *Bennett v. Bennett*, 42 Cal. 629.

**TRANSCRIPT.**—Attorney taking appeal charged with duty of seeing that printed transcript conforms to transcript filed in Clerk's office. *Rousset v. Boyle*, 45 Cal. 64. Matter unnecessary in transcript. *Conroy v. Duane*, 45 Cal. 597. Correction of clerical and typographical errors. *Vassault v. Edwards*, 43 Cal. 459.

**954. PRACTICE ON DISMISSAL OF APPEAL.**—Certificate of clerk under Rule Four. *Bennett v. Bennett*, 42 Cal. 629; *Thompson v. Thornton*, 43 Cal. 24; *Gross v. Cassin*, 43 Cal. 27; *Lewis v. Longmaid*, 43 Cal. 54. Unopposed judgment not necessarily a consent judgment. *San Francisco v. Certain Real Estate*, 42 Cal. 519. Motion under Rule Three to restore appeal, what must be shown. *Dorland v. McGlynn*, 45 Cal. 18.

**956. APPEAL ON JUDGMENT ROLL.**—When appeal stands on the judgment roll. *McAbee v. Randall*, 41 Cal. 136; *Patterson v. Sharp*, 41 Cal. 133. The sufficiency of the evidence will not be considered on an appeal from the judgment alone. *Rycraft v. Rycraft*, 42 Cal. 445; *Harris v. S. F. S. R. Co.*, 41 Cal. 393. Whether the appellate Court will renew the testimony for the purpose of determining whether any evidence was introduced to sustain the allegations of the complaint on which the issue is taken. Query? *Brown v. Brown*, 41 Cal. 89. An order which is itself made by statute the subject of a distinct appeal cannot be renewed. *McCourtney v. Fortune*, 42 Cal. 387. Appeal from second judgment does not carry order vacating former judgment. *Id.* Record on former appeal, how far to be considered. *Id.* The insufficiency of the evidence to sustain the judgment cannot be consid-

ered. *City of Stockton v. Creanor*, 45 Cal. 247. If special issues are submitted to a jury and they fail to find a verdict upon one of them, the appellate Court will not renew alleged erroneous instructions on this issue. *Lorenzana v. Camarillo*, 45 Cal. 125. The appellate Court will not renew the judgment as to whether damages are excessive unless a motion is made in the Court below for a new trial and an appeal is taken from an order denying the same. *Clarke v. Fitch*, 41 Cal. 472. So as to actions of referee on special issues. *Harris v. S. F. S. R. Co.*, 41 Cal. 393. If an order on motion to retax costs is made before the entry of judgment, it may be renewed by an appeal from the judgment with a statement annexed to the record. *Dooly v. Norton*, 41 Cal. 439.

**957.** When the judgment or order is reversed or modified, the appellate Court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases, the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate Court that the appeal was made for delay, it may add to the cost such damages as may be just.

Remedial  
powers of  
Appellate  
Court.

**Effect of Judgment of Supreme Court.** *Donner v. Palmer*, 45 Cal. 190. Where an appeal is clearly without merit, damages will be imposed by the appellate Court. *Gannon v. Dougherty*, 41 Cal. 661; *Perkins v. Patrick*, 45 Cal. 393.

**963. WHEN APPEAL LIES FROM DISTRICT COURT.** — A judgment entered in accordance with an award is a judgment upon a proceeding commenced in a District Court within the meaning of the Practice Act, and is appealable. *Fairchild v. Doten*, 42 Cal. 125. An error in an interlocutory decree in partition must be corrected by motion for new trial, or by appeal. *Tormey v. Allen*, 45 Cal. 119. An appeal does not lie from the refusal to grant an order to show cause why injunction should not issue. Such refusal is not an order refusing to grant an injunction. *Grant v. Johnston*, 45 Cal. 243.







Appeal  
from  
County  
Court, when  
may be  
taken.

**966.** An appeal may be taken to the Supreme Court from the County Courts in the following cases :

1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; in a proceeding in insolvency; and in any special cases and proceedings, and in cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

2. From an order granting or refusing a new trial in the cases designated in this section, and from any special order made after final judgment in such cases.

**APPEAL FROM COUNTY COURT.**—An order of a County Court directing that a criminal charge ignored by one Grand Jury be submitted to another, is not appealable. *People v. Clarke*, 42 Cal. 622. In proceedings involving the legality of an assessment, an appeal lies from the judgment of the County Court. *Appeal of Houghton*, 42 Cal. 35. Construction of words "final and conclusive" in Statute. *Id.* Appeal from County Court in a case appealed from Justice's Court must be taken within ninety days. *Calderwood v. Peyser*, 42 Cal. 110.

Appeal  
from  
Probate  
Court, when  
may be  
taken.

**969.** An appeal may be taken to the Supreme Court from a judgment or order of the Probate Court :

1. Granting, refusing, or revoking letters testamentary, or of administration, or of guardianship;

2. Admitting, or refusing to admit, a will to probate;

3. Against or in favor of the validity of a will, or revoking the probate thereof;

4. Against or in favor of setting apart property, or making an allowance for a widow or child;

5. Against or in favor of directing the partition, sale, or conveyance of real property;

6. Settling an account of an executor, or administrator, or guardian;

7. Refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share;

8. Overruling a motion for new trial;

## 9. Confirming a report of an appraiser setting apart the homestead.

**APPEAL FROM PROBATE COURT.**—An appeal does not lie from an order of the Probate Court setting aside its own proceedings had before final order, upon application to have homestead set apart. *Estate of Johnson v. Tyson*, 45 Cal. 257. The evidence taken in a proceeding in the Probate Court will not be renewed by the Supreme Court, on appeal, unless embodied in a statement. *Estate of Arnaz*, 45 Cal. 259.

**971.** When the order or decree appointing an executor, or administrator, or guardian, is reversed on appeal for error, and not for want of jurisdiction of the Court, all lawful acts in administration upon the estate, performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such order or decree had been affirmed.

Acts of acting executor, etc., not invalidated by reversal of order appointing him.

Effect of reversal. *Estate of Arnaz*, 45 Cal. 260.

**974. APPEALS TO COUNTY COURT.**—The provision in Section Eight, Article VI, of the Constitution, giving to the County Courts appellate jurisdiction, in cases arising in such inferior courts as may be established in pursuance of Section One of the same article, is not a guaranty of individual right; but either confers the absolute right of appeal from the Municipal Court to the County Court, or confers upon the latter the capacity to exercise the jurisdiction, when the Legislature shall provide the mode and means of doing so. *People v. Nyland*, 41 Cal. 129. The question, whether the Constitution confers upon the County Court appellate jurisdiction, in cases transferred from the County Court to the Municipal Court for trial, is reserved. *People v. Nyland*, 41 Cal. 129.

**997.** The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the Clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

Proceedings on offer of defendant to compromise after suit brought.





A party may demand inspection and copy of entry in book, or of document or paper.

**1000.** Any Court in which an action is pending, or a Judge thereof, or a County Judge, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the Court may exclude the entries of accounts of the book, or the document or paper, from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the Court may also punish the party refusing, for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.

**1003. MOTION DEFINED.**—A motion is an application for a rule or order made *viva voce* to a Court or Judge. Making out and filing a written application for such rule or order is not sufficient. The attention of the Court must be called to it, and the Court moved to grant it. *People v. Ah Sam*, 41 Cal. 645.

Service by mail, when.

**1012.** Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail.

Service by mail, how.

**1013.** In case of service by mail the notice or other paper must be deposited in the post office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day for every twenty-five miles distance between the place of deposit and the place of address, such extension, however, not to exceed ninety days in all.

1021. **COSTS.**—A party to an action is entitled to tax as costs, the fees of witnesses subpoenaed by him in good faith, although they were not sworn on the trial. *Randall v. Falkner*, 41 Cal. 242. If the judgment impose a fine without costs, or if a fine be collected, but the costs imposed by the judgment be not collected, in either case the costs of the offices are to be paid out of the fine collected. *Petty v. County Court of San Joaquin*, 45 Cal. 245. If an error is committed by the County Court in the taxation of costs, it must be corrected by a motion. *Petty v. County Court of San Joaquin*, 45 Cal. 245.

1033. The party in whose favor the judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the Court or referee—or, if the entry of the judgment on the verdict or decision be stayed, then, before such entry is made—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed, may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the Court in which the judgment was rendered, or by the Judge thereof at chambers.

Filing and service, and affidavit of bill of costs.

1034. When an appellant includes in the transcript irrelevant matter, he cannot recover costs for procuring or printing the same. *Sichel v. Carillo*, 42 Cal. 493.

1054. When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notices, other than of appeal, the time allowed by this Code may be extended, upon good cause shown, by the Court in which the action is pending, or the Judge thereof, or, in the absence of such Judge from the

Time within which an act under this code to be done, may be extended.







county in which the action is pending, by the County Judge; but such extension shall not exceed thirty days, without the consent of the adverse party.

Order extending time to give notice of motion for new trial. *Cottle v. Leitch*, 43 Cal. 321.

Surety on appeal bond when substituted to rights of judgment creditor.

1059. (N. S.) Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate Court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgments in all respects as if he had recovered the same.

Certiorari defined.

1067. The writ of certiorari may be denominated the writ of review.

WHEN IT LIES.—The writ of certiorari lies only in those cases in which in the exercise of judicial functions, an excess of jurisdiction has occurred, and in which there is no appeal, nor in the judgment of the Court any plain, speedy, and adequate remedy. *Bennett v. Wallace*, 43 Cal. 25. The only cases in which the writ will lie are those in which an inferior tribunal, board, or officer, exercising judicial functions, has exceeded his jurisdiction and there is no appeal, nor in the judgment of the Court any plain, speedy, and adequate remedy. *C. P. R. R. Co. v. Placer Co.*, 43 Cal. 365. Proceedings of Supervisors in laying out a highway are subject to review on certiorari. *Keys v. Marin Co.*, 42 Cal. 253.

WHEN IT WILL NOT LIE. — However erroneous the order of the County Court granting a new trial may be it cannot be brought up for review by a writ of certiorari. *Yenawine v. Richter*, 43 Cal. 313. Certiorari will not lie to set aside the proceedings of a Board of Supervisors in allowing an illegal claim against the county. *Andrews v. Pratt*, 44 Cal. 309.

REMEDY WHEN BARRED BY DELAY.—Unless circumstances of an extraordinary character be shown to have intervened, the remedy by certiorari should be held to be barred by the lapse of one year. *Keys v. Marin Co.*, 42 Cal. 253. The statute was intended to supply a remedy, where none existed in the first instance, and not to supplement one lost through the laches of the party himself. *Bennett v. Wallace*, 43 Cal. 25. In case where an appeal from the judgment might have been taken, but the time for taking it was suffered to elapse, the case does not thereby become one in which "there is no appeal," within the meaning of this section. *Bennett v. Wallace*, 43 Cal. 25.

**TERMS DEFINED.**—The word, “has exceeded the jurisdiction of such tribunal, board,” etc., present substantially the same idea as the words, “has regularly pursued the authority of such tribunal, board,” etc. *C. P. R. R. Co. v. Placer Co.*, 43 Cal. 365.

**POWER TO GRANT WRIT.**—District Courts and the Judges thereof have authority to issue the writ. The amendments to the Constitution do not affect the question. *Keys v. Marin Co.*, 42 Cal. 253.

**1074.** Where a board of supervisors has jurisdiction of a proceeding, and acts upon it, any error it may commit in its conclusions as to facts, not affecting its jurisdiction, cannot be reviewed as certiorari. *Barber v. San Francisco*, 42 Cal. 631. Erroneous views entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy, do not make a case of want of jurisdiction, and are not to be considered upon certiorari. *C. P. R. R. Co. v. Placer Co.*, 43 Cal. 365. An error committed by the County Court in the taxation of costs, cannot be corrected or reviewed on certiorari. *Petty v. Co. Ct. of San Joaquin*, 45 Cal. 245.

**1084.** The writ of mandamus may be denominated a writ of mandate. Mandamus defined.

Writs of mandate are not “special cases,” within the meaning of Article VI, Section Eight, of the Constitution. *People v. Kern Co.*, 45 Cal. 679. A statute declaring that a board of supervisors shall not be sued in any action whatever; but that it may be proceeded against by mandamus, does not change the essential nature, or office, of the writ itself. *Tilden v. Supervisors*. 41 Cal. 68.

**1085.** The Act which attempts to confer power on the County Courts to issue writs of mandate, is unconstitutional. *People v. Kern Co.*, 45 Cal. 679. To whom writ may issue. *Kimball v. Union Wat. Co.*, 44 Cal. 174.

**1086. WHEN WRIT WILL ISSUE.**—A writ of mandate will be issued to compel a Judge to proceed and try a cause, when he refuses to do so. *People v. De la Guerra*, 43 Cal. 225. When the Legislature makes it the duty of the Supervisors of a county to levy a tax sufficient to pay the interest on, and ultimately satisfy the principal of outstanding bonds of the county, the Board must fairly exercise its judgment with a view to effect the end contemplated, and if it refuses to do so, may be compelled by the writ of mandate. *Robinson v. Butte Co.* 43 Cal. 353. If a Board of Supervisors levies a tax which its members know will not produce a sufficient sum, it will be compelled by writ of mandate, to levy the additional percentage required. *Robinson v. Butte Co.*, 43 Cal. 353. See generally: *Kimball v. Union Wat. Co.*, 44 Cal. 175.

**WHEN WILL NOT ISSUE.**—When the Board of Supervisors have acted on a claim, either by allowing or disallowing it, a writ of mandate will not be issued to reverse or review its judgment. *Tilden v. Sacramento Co.*, 41 Cal. 68. Before such writ can be properly awarded, the Board





must refuse to act upon the claim, after it has obtained jurisdiction of it. *Id.* A party entitled to stock in a private corporation, has a right of action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company books, and mandamus will not lie to compel the transfer. *Kimball v. Union Wat. Co.*, 44 Cal. 173. A writ of mandate will not be issued to compel a Court to render a judgment of acquittal in a criminal case. *Ex parte Cage*, 45 Cal. 248.

**WHO MAY APPLY FOR WRIT.**—A private party applying for a writ of mandamus, must have an interest in the subject matter of the action, which is distinguishable from the mass of the community. *Linden v. Alameda Co.* 45 Cal. 6. The fact that he is not an elector will not authorize him to apply in his own name for a writ to compel the Board of Supervisors to order an election of the people to vote on the question of the removal of the county seat. *Linden v. Alameda Co.* 45 Cal. 6.

1088. Motion for writ of mandate on the pleadings. *People v. Alameda Co.*, 45 Cal. 395.

1089. The answer to a petition for a writ of mandate, presented to the Supreme Court, may deny the allegations of the petition upon information and belief. *People v. Alameda Co.* 45 Cal. 395.

1090. Stay of proceedings till service of copy of record on District Attorney and chairman of Board of Supervisors. *Uhler v. Boyd*, 41 Cal. 60. Order to District Court on referring question of fact on mandate proceedings. *People v. Alameda Co.*, 45 Cal. 395.

1092. In a suit for mandamus brought in the Supreme Court, where questions of fact are referred to a District Court, a motion for a new trial must be made in the Supreme Court. *People v. Holloway*, 41 Cal. 409.

If no answer be made, or if it raise immaterial issues, proceedings.

1094. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the Court must proceed to hear or fix a day for hearing the argument of the case.

Penalty for disobedience of writ

1097. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, Board, or person, if it appear to the Court that any member of such tribunal, corporation, or Board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the Court may, upon motion, impose

a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

1104. If, on an application for a writ of mandate, made to the Supreme Court, the answer denies a material averment in the complaint a peremptory writ will not be issued on the pleadings. *People v. Alameda Co.*, 45 Cal. 395.

1108. Writs of review, mandate, and prohibition, issued by the Supreme Court, or by the District Court, may, in the discretion of the Court issuing the writ, be made returnable and a hearing thereon be had at any time.

Writs of review, mandate, and prohibition, when may be returnable.

An affidavit made in support of an application to the Supreme Court for a writ of certiorari to the County Court, must set forth the reason, if any, why the application was not made to the District Court, or to the Judge thereof. *Edwards v. Ryan*, 45 Cal. 243.

1115. It is sufficient for the contestant to allege that he is, at the time he files the written statement of contest, a qualified elector of the county, without alleging that he was so at the time of the election. *Manor v. Kidder*, 43 Cal. 229. The degree of certainty required in a statement of the cause of contest is not the highest degree of certainty known in pleading, but only such as will suffice to inform the defendant of the particular proceeding or cause upon which the contest is founded. Such statement need not detail the particular means or measures resorted to for the purpose of accomplishing a miscount, but only the ultimate facts. *Id.* If the statement of the cause of contest lack the clearness and distinctness of allegation desirable in judicial proceedings, it should not for that reason be peremptorily dismissed, but an opportunity afforded to amend. *Id.*

1132. If a statement for the entry of a judgment by confession, on a promissory note, hereby states that the note was given for money due, the judgment entered upon it is *prima facie* fraudulent as to the creditors of the defendant, but it is not so fatally defective as to be void. The presumption which arises, that such judgment was fraudulent, may be rebutted by proof of the necessary facts, which were omitted from the statement. *Pond v. Davenport*, 44 Cal. 482. A judgment is not void as to creditors, because the action is commenced before the maturity of the note which was the cause of action, and the defendant confesses judgment within service of process. *Pond v. Davenport*, 45 Cal. 225.







**1133.** If an action is commenced, and a summons served, and the defendant, before the time for answering expires, files a verified statement consenting to a judgment, and specifying the amount, and undertaking to state the subject matter of the indebtedness, a judgment entered on such statement is a judgment by confession. *Bond v. Davenport*, 44 Cal. 482. A statement for judgment by confession on a promissory note, should state fully the facts out of which the indebtedness for which the note was given, arose. It is not sufficient in such statement to say that the promissory note was given for money due the plaintiff from the defendant. *Bond v. Davenport*, 44 Cal. 482.

**1159.** **FORCIBLE ENTRY.**—The forcible entry statute now in force, (Stat. 1865-6, p. 768), was evidently drawn to avoid nice distinctions as to the amount of force necessary to constitute an entry a forcible one within its intent. *Gray v. Collins*, 42 Cal. 153. Entry on the actual occupancy of another in possession of part of the public domain when not justified. *Randall v. Falkner*, 41 Cal. 242. If during A.'s temporary absence, B. enters into possession of his premises and refuses to leave on demand, and resists A.'s re-entry, by threats and exhibition of force, and A., without relaxing his efforts to regain possession, finally succeeds in doing so, then B. will not acquire such a peaceable possession as will enable him to evict A. *Bowers v. Cherokee Bob*, 45 Cal. 495. A sufficient enclosure is of itself actual possession of land, without a residence upon it, cultivation or other act of dominion. *Conroy v. Duane*, 45 Cal. 597. A natural barrier renders a fence unnecessary. *Id.*

**1159.** A lease of land with a reservation in it that the lessor may, during the term of the lease, occupy any part or all of the demised premises, does not prevent the lessor from maintaining forcible entry, and detainer against a stranger to the lease for a forcible entry, if the lessor, notwithstanding the lease, continues to occupy the same. *Bowers v. Cherokee Bob*, 45 Cal. 495. One who has title and present right of entry, is not guilty of an unlawful entry into a building, if he enters peaceably and in good faith. *Powell v. Lane*, 45 Cal. 677. He is not guilty of a forcible entry into a building, if he enters in the absence of the occupant, and quietly and peaceably removes the occupant's furniture. *Id.* Where a large number of men were employed to take possession of premises in the possession of another, though he had no house on them, and was not personally present, and they entered hurriedly at daylight; tore down one fence, and put up another and a shanty, and fired off a pistol shot to celebrate its completion; *Held*, that there were sufficient "circumstances of terror" to make the entry a forcible one. *Gray v. Collins*, 42 Cal. 153.

**ACTION FOR.**—In order to maintain an action for a forcible entry, or forcible detainer, the plaintiff must prove that, at the time of the ouster complained of, he was in the actual and peaceable possession of the demanded premises. A constructive and scrambling possession is not sufficient. *Conny v. Duane*, 45 Cal. 597. What constitutes an "oc-

cupant" and peaceable possession. *Shelby v. Houston*, 38 Cal. 410; affirmed, *Wilson v. Shackelford*, 41 Cal. 630. Possession of premises under the Act, may be had without actual presence. *Id.* In a forcible entry case, where the property was a city lot, and it appeared that plaintiff built a substantial fence, which, with the house and fence of a neighbor on one side, made a complete enclosure, and planted two dozen ornamental trees along two sides of it; and that this state of things continued two months, when defendants entered; *Held*, that the plaintiff was in the peaceable and actual possession of the lot, within the meaning of the forcible entry law, without residing or having a house upon it. *Gray v. Collins*, 42 Cal. 152. If the occupation of the plaintiff was acquired and maintained with threats and force, as against third persons not in privity with the defendants, it affords no justification to the defendants for invading the premises; for, as against the defendants, the plaintiffs' occupation was peaceable and actual. *Bowers v. Cherokee Bob*, 45 Cal. 495. Evidence in action, see generally: *Bowers v. Cherokee Bob*, 45 Cal. 495.

**UNLAWFUL DETAINER.**—One who goes upon the land several weeks after the alleged ouster and forcible detainer, simply as an employee of the parties who ousted the plaintiffs, and has no other connection with the transaction, is not guilty of an unlawful entry and forcible detainer. *Conroy v. Duane*, 45 Cal. 597. If the entry was unlawful and the detainer forcible, the defendant is guilty of a forcible detainer whether he originally obtained possession peaceably or otherwise. *Id.* It is also necessary to prove that the defendant made a forcible entry, or forcibly detained the premises from the plaintiff. *Id.*

1160. Verdict in unlawful entry and forcible detainer. *Conroy v. Duane*, 45 Cal. 597.

1161. A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

Unlawful  
detainer  
defined.

1. Where he continues in possession in person, or by sub-tenants, of the property, or of any part thereof, after the expiration of the term for which it is let to him, without permission of his landlord; but, in a case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code;

2. Where he continues in possession in person, or by sub-tenants, without the permission of his landlord, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days notice in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon





him, and if there be a sub-tenant in actual occupation of the premises, also upon such sub-tenant. Such notice may be served at any time within one year after the rent becomes due;

3. Where he continues in possession in person, or by sub-tenants, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, than the one for payment of rent, and three days notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there be a sub-tenant in actual occupation of the premises, also upon such sub-tenant.

Within three days after the service of the notice, the tenant, or any sub-tenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture. A tenant may take proceedings similar to those prescribed in this Chapter, to obtain possession of premises let to an undertenant, in case of his unlawful detention of the premises underlet to him.

In an action of unlawful detainer, against a tenant for holding over, the mere fact that the tenant has been in the quiet and peaceable possession of the premises, for one year before the commencement of the suit, will not defeat the action. *Johnson v. Cheby*, 43 Cal. 300. If a tenant fails to pay rent when it falls due, and for three days after a demand thereof, and for possession of premises by the landlord, his subsequent tender thereof, with interest and costs, is no defense in an action of unlawful detainer. *Roussel v. Kelly*, 41 Cal. 360. Deed for what purpose admissible in evidence. *Conroy v. Duane*, 45 Cal. 597. Evidence generally. See *Id.* and *Johnson v. Cheby*, 43 Cal. 300. One who enters peaceably and in good faith, under a claim of title, is not liable for an unlawful detainer, even if he resists the entry of the prior possessor. *Conroy v. Duane*, 45 Cal. 597.

**ACTION FOR UNLAWFUL DETAINER.**—If a person enters unlawfully upon land in the possession of another, during his absence, and upon demand being made refuses to restore the possession, he may be proceeded against in an action of unlawful detainer. *Randall v. Falkner*, 41 Cal. 242.

**1162.** The notices required by the preceding section may be served, either: Service of notice.

1. By delivering a copy to the tenant personally; or,
2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant, at his place of residence; or,

3. If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a sub-tenant may be made in the same manner.

If the notice to a tenant at will, requiring him to surrender the premises, describe the premises with sufficient certainty, so that the tenant is not misled thereby, it is sufficient, even though there are misdates in the description. *King v. Connolly*, 44 Cal. 236.

**1164.** No person other than the tenant of the premises, and sub-tenant, if there be one, in the actual occupation of the premises, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any persons who might have been made parties defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offense charged, judgment must be rendered against him. In case a married woman be a tenant or a sub-tenant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a personal judgment against her, can only be enforced against property on the premises at the commencement of the action. Parties defendant.







Complaint,  
what must  
state.

**1166.** The plaintiff must file with the Clerk of the County Court his written complaint, setting forth therein the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. On filing the complaint, the Clerk must issue a summons thereon, returnable at a day designated therein, which shall not be less than three days nor more than twelve days from its date.

Summons  
to issue.

Summons,  
form, and  
service of.

**1167.** The summons must state the parties to the proceeding, the Court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day, and must notify the defendant to appear and answer within the time designated, or that the relief sought will be taken against him. The summons must be directed to the defendant, and be served at least two days before the return day designated therein, and must be served and returned in the same manner as summons in civil actions is served and returned. Upon the return of any summons issued under this section, where the same has not, for any reason, been served, the plaintiff may have an alias summons issued.

Trial by  
jury.

**1171.** Whenever an issue of facts is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the County Court.

Verdict and  
judgment.

**1174.** If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the Court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an un-

lawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the Court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint, and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent, and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any sub-tenant, or any mortgagee of the term, or other party interested in its continuance, may pay into Court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the Court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but, if payment, as here provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

1179. (N. S.) The County Court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in cases of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the Court, as

Relief of  
tenant, ap-  
plication by  
whom and  
how made.





provided in section eleven hundred and seventy-four. The application may be made by a tenant, or sub-tenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, is made.

1180. Title under later sale on elder lien superior to title under earlier sale on junior lien. *Littlefield v. Nichols*, 42 Cal. 372.

What labor-  
ers, contrac-  
tors, etc.,  
may have  
liens upon.

1183. Every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, sub-contractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this chapter. (In effect May 29th, 1874.)

Agent, who  
deemed

The Mechanics Lien Law of 1868 not unconstitutional. *Hicks v. Murray*, 43 Cal. 515. Who entitled to liens. *Barber v. Reynolds*, 44 Cal. 519. If the owner of land, or any one claiming an interest in it, knowingly permits buildings and improvements to be erected on it without giving notice that it is done without his consent, it is just that he should be held to have acquiesced therein as provided in section four of the Mechanics Lien Law (Stat. 1868, 589), and the power of the Legislature to enact that provision is clear. *Fuquay v. Stackney*, 41 Cal. 583.

1184. A contractor for the improvement of a street, does not lose his lien on lots fronting on the same, for the assessments made thereon, by the mere lapse of two years before the entry of judgment, from the date of recording the assessment, diagram and warrant, provided his action to enforce the lien is commenced within that time. *Randolph v. Bayne*, 44 Cal. 366.

1185. The land upon which any building, improvement, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the Court on rendering judgment, is also subject to the lien, if, at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered, or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien.

What interest in the land subject to the lien.

A lien for work or material cannot be acquired on a portion of a railroad, but must be filed on the entire road. The contractor who grades a section only of a road, cannot file a lien on that section alone. *Cox v. W. P. R. R. Co.*, 44 Cal. 18. Where an insurance company loaned the owner of a lot and uncompleted building, money for the purpose of finishing the building, and took from him a deed of trust conveying the fee, defeasable on the payment of the debt, and afterwards knowingly permitted the building to go on without giving notice that it would not be responsible therefor; *Held*, that the interest in the property held by the insurance company, was subject to mechanics' liens, for work done and materials furnished after the making of the trust deed. *Fuquay v. Stickney*, 41 Cal. 583.

1186. The lien of a judgment rendered after labor is commenced, or material is first delivered, is postponed to the lien of the material man or laborer, although the labor is completed, and the last of the material delivered after the judgment is docketed. *Barber v. Reynolds*, 44 Cal. 519. Day when mechanic's lien takes effect—doctrine of relation. *Barber v. Reynolds*, 44 Cal. 519.

1187. Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the

Claim of lien to be filed in Recorder's office.







performance of any labor in a mining claim, file for record with the County Recorder of the county in which such property, or some part thereof, is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person. (In effect May 29, 1874.)

If the person who claims a mechanics' lien under the Act of 1868, signs the verification attached to the claim, this is a sufficient signing of the claim, within the intent of the Act. *Hicks v. Murray*, 43 Cal. 515. It is material that the claim, for the benefit of the lien, shall state the name of the owner, or reputed owner, of the premises. *Id.* The clause requiring the person filing the claim to state therein the name of the person by whom he was employed, is intended to require the statement of a mere fact, and not of a conclusion of law. *McDonald v. Backus*, 45 Cal. 262. A lien for labor or materials, under the Lien Act of 1862, will not be rejected because it was filed in the Recorder's office for too much, unless it appears that it was a willfully false claim. *Barber v. Reynolds*, 44 Cal. 519. Neither the contractor, nor sub-contractor, can file successive liens for work done on an entire contract. But one lien can be acquired, and that must be filed within the time specified in the statute, after the completion of the work. *Cox v. W. P. R. R. Co.*, 44 Cal. 18. If the claim, as filed, states the name of the person by whom he was employed, and it turns out that such person was a member of a firm, and employed him in behalf of the firm, the mechanic, in an action to enforce the lien, may, and should, make all the members of the firm defendants, notwithstanding that the name only of the one by whom he was employed appears in the claim filed with the Recorder. *Hicks v. Murray*, 43 Cal. 515.

Improvement held to be constructed at instance of owner.

**1192.** (N. S.) Every building or other improvement mentioned in §1183 of this Code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of

this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon. (In effect May 29, 1874.)

Notice to  
avoid  
liability.

1193. (N. S.) The contractor shall be entitled to recover upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid; and in all cases where a lien shall be filed, under this chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor the amount of such judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable. [In effect May 29th, 1874.]

Measure of  
recovery by  
contractor.  
protection  
of owner's  
rights.

1194. In every case in which different liens are asserted against any property, the Court in the judgment must declare the rank of each lien, or class of liens, which shall be in the following order, viz: First. All persons other than the original contractors and sub-contractors. Second. The sub-contractors. Third. The original contractors. And the proceeds of the sale

Court to  
declare rank  
of liens.





of the property must be applied to each lien, or class of liens, in the order of its rank, and whenever, on the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner, and with like effect as in actions for the foreclosure of mortgages. (In effect May 29, 1874.)

Old §§1192, 1194, and 1195 combined.

Separate actions may be consolidated.

Costs.

**1195.** Any number of persons claiming liens may join in the same action, and when separate actions are commenced, the Court may consolidate them. The Court may also allow, as part of the costs, the moneys paid for filing and recording the lien, and reasonable attorney's fee in the District and Supreme Courts. (In effect May 29, 1874.)

Old §§1193 and 1196 combined.

Materials furnished, when exempt from execution.

**1196.** (N. S.) Whenever materials shall have been furnished for use in the construction, alteration, or repair of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement. (In effect May 29, 1874.)

The several parties who furnish materials for, or perform labor on a building, constructed without any contract in writing for building the same, may unite in an action to enforce their several liens. *Barber v. Reynolds*, 44 Cal. 519.

Lien not to impair right to personal action.

**1197.** Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done, or materials furnished to maintain a personal action to recover such debt against the person liable therefor.

In a judgment enforcing a mechanics' lien, a personal judgment cannot be rendered against those defendants against whom no personal claim is established. *Barber v. Reynolds*, 44 Cal. 519.

1204. In all assignments of property, made by any person to trustees or assignees, on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks, or laborers employed by such person, to the amount of one hundred dollars each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor.

Certain persons preferred creditors when assignments of property is made.

1205. In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant, and laborer, for services rendered within the sixty days next preceding the death of the employer, not exceeding one hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before other claims against the estate of the deceased person.

Same, against estates.

1206. In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented, and claiming preference under this section, are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recov-

Same, in cases of executions and attachment.







ery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim, with the same rank as the original claim.

1209. A husband who lives separate from his wife, and has been adjudged by a Court of Equity to pay her a certain sum monthly for her support and that of her infant child, is not guilty of contempt for not paying the sum if he is unable to pay it, and has not voluntarily created the disability for the purpose of avoiding the payment. *Galland v. Galland*, 44 Cal. 475.

1210. Under the act of 1872, for the punishment of contempt and trespass, it is essential that the person accused be one who has been ejected or dispossessed, as provided in the act. *Batchelder v. Moore*, 42 Cal. 415.

1211. When the alleged contempt is not committed in presence of the Court, an affidavit of the facts constituting the contempt must be presented in order to set the power of the Court in motion. If the affidavit be defective in stating the facts, it is equivalent to the utter absence of an affidavit. *Batchelder v. Moore*, 42 Cal. 415. The statute of the State in relation to contempt, is a limitation upon the power formerly exercised by Courts to punish for contempt. *Galland v. Galland*, 44 Cal. 475.

1222. The question whether an appeal lies from an order made after final judgment, adjudging a judgment debtor guilty of contempt for not applying his property on the execution, not decided. *Briggs v. McCullough*, 36 Cal. 542. An order of Court, adjudging a party guilty of a contempt is not appealable. *Aram v. Shallenberger*, 42 Cal. 277.

1227. The ownership of property is not essential to the existence of a corporation, nor is a corporation dissolved by the sale of its property. *Sullivan v. Triunfo M. Co.*, 39 Cal. 459. The Court cannot treat a corporation as already dissolved, because its condition or business arrangements are such that it will be necessary or proper for it to institute proceedings for its dissolution. *Sullivan v. Triunfo M. Co.*, 39 Cal. 459.

1237. The Act of April 1st, 1870, empowering the city of Stockton to aid in the construction of the Stockton and Visalia railroad, declared constitutional. *S. & V. R. R. Co. v. Stockton*, 41 Cal. 147. And, as fostering a public use, may be extended to the construction of a railroad, by means of the power of eminent domain. *S. & V. R. R. Co. v. Stockton*, 41 Cal. 147. See generally: Particularity of notice on alteration of road. *Potter v. Ames*, 43 Cal. 75. Changing grade of streets in San Francisco; control by Supervisors over proceedings; report of Commissioners. *People v. San Francisco*, 43 Cal. 91.

1238. Subject to the provisions of this Title, the right of eminent domain may be exercised in behalf of the following public uses:

Eminent domain may be exercised, on behalf of what uses.

1. Fortifications, magazines, arsenals, navy yards, navy and army stations, light houses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States;

2. Public buildings and grounds for the use of the State, and all other public uses authorized by the Legislature of this State;

3. Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town or school districts, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town; or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements, shall be such as may be provided in the statutes by which the same may be authorized;

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, steam and horse railroads; canals, ditches, flumes, aqueducts and pipes, for public transportation, supply-





ing mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also, outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also, an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines;

6. By-roads leading from highways to residences and farms;

7. Telegraph lines;

8. Sewerage of any incorporated city, or city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the State, or to any college or university.

The Legislature did not intend by the Act of January 31st, 1870, relative to the opening of streets in Oakland, to authorize the City Council to proceed to open, extend, straighten, or widen any street, except in cases where the Council were satisfied that the benefits to lands affected thereby, and to be assessed therefor, would exceed the damages to private property, necessarily occasioned, and the expenses of the proceeding and work. *Jacobus v. Oakland*, 42 Cal. 21. Duty of commissioners appointed under the Act. *Id.* A Roadmaster has no right to open a public highway over private land, until all the provisions of the statute, under which he is proceeding, have been strictly complied with. *Murphy v. DeGroot*, 44 Cal. 51.

Estates and  
rights sub-  
ject to con-  
demnation

**1239.** The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine;

2. An easement, when taken for any other use;

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

The condemnation of land in a street for the use of a railroad company, to enable it to lay and operate its track, gives it no title to the land condemned, nor any interest in it, except a mere easement in common with the general public. *S. P. R. R. Co. v. Reed*, 41 Cal. 256.

**1241. PUBLIC USE.**—The mere fact that a railroad is owned and operated by a private corporation, and for private profit, does not prevent it from being also of “public use.” *S. & V. R. R. v. Stockton*, 41 Cal. 147. That railroads concern the public interest as a matter of legal judgment, and that legislative action to that effect is not open to review by the judicial department. *N. V. R. R. Co. v. Napa Co.*, 30 Cal. 437, cited: *S. & V. R. R. Co. v. Stockton*, 41 Cal. 147.

**STEPS TO BE TAKEN.**—It is competent for the Legislature to prescribe the several steps to be pursued in the assertion of a right to compensation for land appropriated for public use; but the prescribed procedure must not destroy or substantially impair the right itself. *Potter v. Ames*, 43 Cal. 75.

**1244. The complaint must contain:**

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiffs;
2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants;
3. A statement of the right of the plaintiff;
4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with surveys and maps thereof;
5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract.

The complaint and its contents.

All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the Court may consolidate or separate them, to suit the convenience of parties.

When application for the condemnation of a right of way for the purposes of sewerage is made on behalf of a settlement, or of an unincorporated village or town, the County Judge alone must be named as plaintiff.







1247. If commissioners appointed to assess damages and benefits, in an application to condemn land for a railroad, assess the cost of fencing separately from the estimate of damages to land not taken, there is no substantial error, although the directions of the statute are not technically complied with; and, in such cases, the Court may enter judgment for the value of the land taken and the cost of fencing, and the excess of damages over benefits to land not taken, if there are any. *C. P. R. R. Co. v. Frisbie*, 41 Cal. 356.

1248. The Legislature did not intend that the aggregate damages to private property, including the value of land taken for the street, and the expenses of the commissioners should be paid for in money, by assessment upon the several parcels of land benefited by the proposed improvement, in proportion to the benefits to accrue to each. *Jacobus v. Oakland*, 42 Cal. 21. If the commissioners, in a case where the damages exceed the benefits to land not taken, assess the value of the land taken, and then the gross amount of damages to land not taken, over the benefits to land not taken, it is a substantial compliance with the statute requiring them to ascertain and assess the damages to land not taken, and the benefits to land not taken. *C. P. R. R. Co. v. Frisbie*, 41 Cal. 356.

1252. When the Act for condemning land for a public highway requires the money allowed to a land owner, for damages, to be set apart in the treasury, by the Supervisors, for the owner, the land is not taken for public use until it is so set apart; and an order of the Supervisors awarding the damages allowed, payable from the current expense fund of the County, is not a taking of the land for public use, and a tender to the land owner of the damages allowed, made after such order, is of no avail. *Murphy v. De Groot*, 44 Cal. 51. The right of way over private lands for a road does not vest in the public until the land owner has been paid or tendered the damages awarded or adjudged to him for the land taken. The recovery by the land owner of a judgment for his damages does not authorize the public to remove his fences and open the road. *Brady v. Bronson*, 45 Cal. 640.

Annual  
return to be  
made to  
Secretary of  
State.

1279. (N. S.) Each County Clerk shall annually, in the month of January, make a return to the office of the Secretary of State of all changes of names made in the County Court of his county under this title; such return shall show the date of the decree of the Court, original name, name decreed, and residence. Such returns shall be published in a tabular form with the statutes first published thereafter. (In effect May 12th, 1874.)

1281. The subject matter of an action for the recovery of mining ground on public land, is regarded in this State as "a question of title to real property in fee," and therefore cannot be submitted to arbitration; and if so submitted, an award and judgment thereon will, on motion, be vacated and set aside. *Spencer v. Winselman*, 42 Cal. 481; see, generally, *Pieratt v. Kennedy*, 43 Cal. 394.

1283. The statute provides only for entering the submission to awards as a rule of Court. If it clearly appears that the parties meant merely that the award and not the submission should be a rule of Court, or that judgment should be entered upon the award, the Court has no jurisdiction. *Fairchild v. Doten*, 42 Cal. 125. The clerk of the Court must be authorized by the stipulation of the parties to an arbitration, to enter in his register of actions a note of the submission, and he must make the entry therein; otherwise there is no jurisdiction of the Court over the subject matter or the parties. *Pieratt v. Kennedy*, 43 Cal. 393. See generally: *Spencer v. Winselman*, 42 Cal. 482.

1286. Proceedings upon award are special in character, and they must be in substantial compliance with the statute, or the judgment upon the award will not be valid. *Fairchild v. Doten*, 42 Cal. 125.

1289. Judgment on an award appealable. *Fairchild v. Doten*, 42 Cal. 128.

1300. A petition for the probate of a will must show: Contents of petition.

1. The jurisdictional facts;
2. Whether the person named as executor consents to act, or renounces his right to letters testamentary;
3. The names, ages, and residence of the heirs and devisees of the decedent, so far as known to the petitioner;
4. The probable value and character of the property of the estate;
5. The name of the person for whom letters testamentary are prayed.

No defect of form or in the statement of jurisdictional facts actually existing shall make void the probate of a will.

1304. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the State, at their places of residence, if known to the petitioner, and deposited in the post office, with the postage thereon prepaid, at

Heirs and named executors to be notified how.





least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the post office at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as coexecutor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing.

See generally: *Randolph v. Bayue*, 44 Cal. 370.

Hearing  
proof of  
will.

1306. At the time appointed for the hearing, or the time to which the hearing may have been postponed, the Court, unless the parties appear, must require proof that the notice has been given, which being made, the Court must hear testimony in proof of the will.

Charging administrator with interest. *Estate of McQueen*, 44 Cal. 588.

Who may  
appear and  
contest will.

1307. Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the Court, for that purpose; but a contest made by an attorney appointed by the Court does not bar a contest after probate by the party so represented, if commenced within the time provided in Article IV of this chapter; nor does the non-appointment of an attorney by the Court of itself invalidate the probate of a will.

Citation to  
be issued to  
parties in-  
terested.

1328. Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the State, so far as known to the petitioner; or to their guardians, if any of them are minors; or to their personal representatives, if any of them are dead; re-

quiring them to appear before the Court on some day of a regular term, therein specified, to show cause why the probate of the will should not be revoked.

1333. If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed.

Probate when conclusive, saving as to infants and persons of unsound mind.

1340. When a lost will is established, the provisions thereof must be distinctly stated and certified by the Probate Judge, under his hand and the seal of the Court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon, in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect as evidence, as provided in section thirteen hundred and sixteen.

To be certified, recorded, and letters thereon granted.

1384. When such petition is filed, the clerk must, in addition to the notice provided in section thirteen hundred and seventy-three, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.

When petition filed, citation and notice.

1394. Before the Probate Judge approves any bond required under this title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him, at a designated time and place, to be examined touching their property and its value; and the Judge must, at the same time, cause a notice to be issued to the executor or administrator, requiring his appearance on the return of the citation, and on its return he may examine

Citation and requirements of judge on deficient bond. Additional security.







the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if upon such examination he is satisfied that the bond is insufficient, he must require sufficient additional security.

When bond may be dispensed with.

**1396.** When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed without any bond, unless the Court, for good cause, require one to be executed; but the executor may at any time afterwards, if it appear from any cause necessary or proper, be required to file a bond, as in other cases.

Liability on bond of executor, etc. Kind of money.

**1407. (N. S.)** The liability of principal and sureties upon the bond of any executor, administrator, or guardian, is in all cases to pay in the kind of money or currency in which the principal is legally liable.

**1443.** See generally: *Estate of Simmons*, 43 Cal. 549.

**1452.** Where a widow, who was both devisee and executrix, married, and she and her husband then deeded the land devised; *Held*, that though the marriage may have operated as a revocation of the letters testamentary, yet there was an unclosed administration, and the grantee was not entitled to possession. *Chapman v. Hollister*, 42 Cal. 462.

Penalty for refusal to obey citation, and for embezzlement.

**1460.** If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matter of the complaint, the Court may, by warrant for that purpose, commit him to the County Jail, there to remain in close custody until he submits to the order of the Court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge, any deeds, conveyances, bonds, contracts, or other writings, tending to disclose the right, title, interest, or claim of the decedent to any

real or personal estate, claim, or demand, or any lost will of the decedent, the Probate Court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the County Jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the Probate Court. The order for such disclosure, made upon such examination, is *prima facie* evidence of the right of such administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the Court or jury, or for return of the property, and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

May be coerced to disclose by imprisonment.

Liable in double damages.

1465. See generally: Estate of Boland, 43 Cal. 642; Estate of Ballentine, 45 Cal. 698.

1468. When property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children.

Property set apart, how apportioned between survivor and children.

See generally: Est. of Boland, 43 Cal. 642.

1474. If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either

Homestead succession, how governed.





husband or wife, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the Probate Court to assign it for a limited period to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code.

When, after the death of the husband, the premises constituting the family residence are set apart by the Probate Court for the use of the widow and family, they cease to be a part of the assets of the estate, and are no longer subject to the control of the administrator or the Probate Court. *Schadt v. Heppe*, 45 Cal. 433. The Probate Court, in setting apart for the use of the family of the deceased husband or wife, property which had been dedicated as a homestead, under the Homestead Act, does not change or transfer the title; nor does it adjudicate the question of title. *Rich v. Tubbs*, 41 Cal. 34. The purpose and effect of an order of the Probate Court, setting apart such homestead, is, that the property be relieved from administration, and that it does not constitute assets of the estate of deceased. *Id.*

Selected  
and record-  
ed home-  
stead set off  
to person  
entitled.

Subsisting  
liens how  
paid.

**1475.** If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the Probate Court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims allowed against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionally with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.

The Probate Court must set apart, for the use of the widow, or minor child or children of the deceased, a homestead, if an application is

made therefor, and if none had been selected before his death. The Court has no discretion to deny the application. *Estate of Ballentine*, 45 Cal. 696. If there has been no homestead created during the existence of the community, by a compliance with the Homestead Act, the widow can acquire no homestead interest in the property, under the provisions of the Probate Act, until an order of the Probate Court, or Judge, has been made, setting it apart to her. *Estate of Boland*, 43 Cal. 641. If the widow, who is entitled to a homestead, again marries before an order of the Probate Court is made, setting apart such homestead, she loses, by her marriage, the right to such homestead. *Id.* If, in his will, the testator devises to his wife a portion of his property, provided she elects to accept the bequests, in lieu of what the law may set aside to her, and the wife accepts the devise, she and her grantees are estopped from setting up title to a homestead, which the law would have set aside to her. *Etcheborne v. Auzeais*, 45 Cal. 122.

The word "may" as used in the one hundred and twenty-first section of the act concerning the estates of deceased persons is to be construed as "shall." *Estate of Ballentine*, 45 Cal. 696.

1476. If the homestead, as selected and recorded, be returned in the inventory appraised at more than five thousand dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto, such portion of the premises, including the dwelling house, as will amount in value to the sum of five thousand dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five thousand dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the Court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto.

Appraisers to carve out of the original, exceeding five thousand dollars in value, a homestead, and report the same.







Day to be set for confirming or rejecting report of commissioners.

**1478.** When the report of the appraisers is filed, the Court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time, and in such manner as the Court may direct. If the Court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the Court may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report.

**1479, 1480, 1481, 1482, 1483, 1484,** are repealed.

**1481.** See generally: Estate of Boland, 43 Cal. 641.

**1490.** If the wife, to secure the debt of the husband, mortgage her separate property, and the husband dies, and the holder fails to present the claim for allowance, and the mortgage is afterwards enforced; whether the widow has a contingent claim which she may afterwards enforce against the estate spoken of, but not decided. *Sichel v. Carrillo*, 42 Cal. 497.

Time within which claims must be presented.

**1493.** If a claim arising upon a contract heretofore made, be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute; if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator, and the Probate Judge, that the claimant had no notice, as provided in this chapter, by reason of being out of the State, it may be presented any time before a decree of distribution is entered. A claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged, must be presented within one month after such deficiency is ascertained. All claims arising upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice; and any claim not so presented, is barred forever; *provided*, however, that when it is made to appear by the affidavit of the claim-

ant, to the satisfaction of the executor or administrator, and the Probate Judge, that the claimant had no notice as provided in this chapter, by reason of being out of the State, it may be presented at any time before a decree of distribution is entered.

See generally: *Sichel v. Carillo*, 42 Cal. 497; *People v. Olvera*, 43 Cal. 494.

**1494.** Every claim which is due when presented to the administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reasons why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent, no greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed on judgments obtained in the District Court.

Claims to be sworn to, and when allowed to bear the same interest as judgments.

When the family residence, the common property of the husband and wife, is mortgaged, the husband afterwards dies, and the premises are then set apart by the Probate Court for the use of the widow and family, it is not necessary to present the mortgage claim to the administrator for allowance, before suit to enforce it, provided no claim is made against the assets of the estate for a deficiency. *Schadt v. Hoppe*, 45 Cal. 433. Taxes assessed, pending administration, and while the property is in the possession, and under the control of an administrator, are not claims against the estate, which must be presented to the administrator for allowance. The administrator must pay such taxes, as expenses in the care and management of the estate. *People v. Olvera*, 43 Cal. 492. See generally: *Christy v. Dana*, 42 Cal. 178.





Allowance  
and rejection  
of  
claims.

**1496.** When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allows the claim, it must be presented to the Probate Judge, for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the Judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, is *prima facie* evidence of such presentation and rejection. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the Judge, after the expiration of such time. If the claim be payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency.

See, generally : Bank of Stockton v. Howland, 42 Cal. 132.

Claims  
must be  
presented  
before suit.

**1500.** No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator.

Execution  
not to issue  
after death.

**1505.** When any judgment has been rendered for or against the testator intestate in his lifetime, no execution shall issue thereon after his death, except as provided in §686. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or in-

testate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner, and with like effect, as if the judgment debtor were still living. (In effect March 28, 1874.)

1513. (N. S.) If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the Court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to existing debts, unless the creditor consent to accept the amount.

Payment of  
interest on  
claims.

1516. All the property of a decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, except as otherwise provided in this Code and in the Civil Code. And the said property, personal and real, may be sold as the Court may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes.

Personal  
estate first  
chargeable.

Real estate  
when sold.

1518. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale.

Applica-  
tions for  
orders of  
sale, defects  
in state-  
ments cured  
by proofs.







But one petition, order, and sale must be had except in case of perishable property.

**1519.** When it appears to the Court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in the case of perishable property, which may be sold as provided in § 1522. The Probate Court, when a petition for the sale of any property, for any of the purposes herein named, is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required by §1537.

Order to sell personal property.

**1523.** If claims against the estate have been allowed, and a sale of property is necessary for their payment, or the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application, either in vacation or term, from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appear for the best interest of the estate, he may, at any time after filing the inventory, in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not.

Order of sale, what to direct.

**1525.** If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the Court or Judge must order it to be made. In making orders and sales

for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the Court or Judge must so direct.

1526. The sale of personal property must be made at public auction, for such money or currency as the Court may direct, and after public notice given for at least ten days, by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold; unless, for good reason shown, the Probate Court or Judge orders a private sale, or a shorter notice. Public sales of such property must be made at the Court House door, or at the residence of the decedent, or at some other public place, but no sale shall be made of any personal property, which is not present at the time of sale, unless the Court otherwise order.

Sale of  
personal  
property.

1536. When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies, the executor or administrator may also sell any real, as well as personal property of the estate, for that purpose, upon the order of the Probate Court; and an application for the sale of real property may also embrace the sale of personal property.

Executor to  
sell real  
estate,  
when.

If, in a devise to executor, in trust for heirs, the testator expresses a desire that his homestead shall not be sold, unless necessary, and that the same shall be used by his widow and children as a home, the executors have authority to sell the homestead, if it becomes necessary. *Etcheborne v. Auzerais*, 45 Cal. 122.

1537. To obtain an order for the sale of real property, he must present a verified petition to the Probate Court, or to the Judge at Chambers, setting forth the amount of personal property that has come to his hands, and how much thereof, if any, remains undisposed of ;

Verified  
petition for  
sale, what  
to contain,  
and to what  
it may refer.





the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof, and whether the same be community or separate property; the names of the legatees and devisees, if any, and of the heirs of the decedent, so far as known to the petitioner. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary, will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree.

Copy to be served; assent in writing to dispense with notice.

**1539.** A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee, or devisee, or heir of the decedent, provided they are residents of the county at least ten days before the time appointed for hearing the petition, or be published four successive weeks in such newspaper in the county as the Court or Judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time.

See generally : Est. of Simmons, 43 Cal. 547.

**1546 and 1550 are repealed.**

Sale without order, to be confirmed by the court.

**1561.** When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the Probate Court, and at either pub-

lic or private sale, and with or without notice, as the executor may determine ; but the executor must make return of such sales as in other cases ; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale is confirmed by the Court.

1576. If a person procures himself to be appointed administrator of an estate, and at a sale of the property of the estate purchases the same through a third person, who pays no money, and agrees to hold the title for the administrator, the sale is a fraud on the heirs, and such third person, and all who buy from him with notice, hold the property in trust for the heirs. *Scott v. Umbarger*, 41 Cal. 410.

1581. Administrator to take possession of entire estate. *Estate of McQueen*, 44 Cal. 589. See generally : *Chapman v. Holister*, 42 Cal. 463. *Est. of Simmons*, 43 Cal. 551.

1597. A Probate Court has no authority, on the petition of an executor, to order him on the receipt of money loaned, to re-convey real estate conveyed to his testator by deed absolute on its face, but intended only as security for the repayment of such money. *Anderson v. Fisk*, 41 Cal. 308.

1601. The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the Recorder of the county where the lands lie, and is *prima facie* evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance.

Execution  
of convey-  
ance, and  
record  
thereof.

1602. The question whether the Probate Court has jurisdiction to specifically enforce the performance of a contract for the sale of real estate, not decided. *Treat v. DeCelis*, 41 Cal. 202.

1613. Where the administrator did not keep the funds of the estate separate from his own money, but used them for his own purpose ; *Held*, he was properly chargeable with interest. *Estate of Gasq*, 42 Cal. 289. An administrator who withdraws money belonging to an estate from a solvent bank, where it had been drawing, and would have continued to draw interest, when he had sufficient money to pay the debts of the estate, and expenses of administration, without drawing it, does not thereby become chargeable with interest on the sum thus withdrawn ; provided he does not mingle it with his own, or use it for his own profit, or deposit it in a bank in his own name, or neglect to







settle his account for a long time. *Estate of McQueen*, 44 Cal. 584. When the administrator uses the funds of the estate in his private business, or retains them in his hands for an unreasonable length of time, to the prejudice of the heirs and creditors, he will be charged interest on the same in his settlement. *Walls v. Walker*, 37 Cal. 424. He may be held to account either for the interest which he might, with ordinary diligence, have obtained upon a loan of the fund, or for the profit realized by an investment. *Estate of Holbert*, 39 Cal. 597. See generally: *Estate of Simmons*, 43 Cal. 549.

Compensation of the executor and administrator.

**1616.** He shall be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in the probate or other Courts, and for his services, such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument filed in the Probate Court, he renounces all claim for compensation provided by the will. (Approved March 24, 1874. In effect May 23, 1874.)

If expenses are incurred in attempting to administer, the administrator should be allowed them, so far as they are necessary. *Estate of Simmons*, 43 Cal. 543. The employment of an attorney for the mere purpose of procuring letters of administration, is a contract made in advance of any authority on the part of the client to deal with the assets of the estate in anywise; and whether the application be successful or not, the estate is not to be charged with the fees of the attorney for the applicant. *Estate of Simmons*, 43 Cal. 543. But after the administrator had become such, the fees of attorneys employed by him in the management of adversary suits in which the estate may be involved, may be allowed from the assets of the estate. *Estate of Simmons*, 43 Cal. 543. A ruling of the Probate Court, on fixing the amount of compensation to be allowed an administrator in payment of counsel on the settlement of an estate, will not be disturbed unless there is a plain abuse of discretion. *Estate of Gasq*, 42 Cal. 289.

Executor's and administrator's commissions.

**1618.** When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the whole estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent. ; for all above that sum, and not exceeding ten thousand dollars, at the rate of five per cent.; for all above that sum at

the rate of four per cent.; and the same commission must be allowed administrators. In all cases, such further allowance may be made as the Probate Judge may deem just and reasonable, for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section; and that public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators. (Approved 24th March, 1874. In effect May 23th, 1874.)

An act concerning service of summons upon absent defendants by publication, approved March 15th, 1872, is repealed. (In effect March 20th, 1874.)

The Probate Court should not allow an administrator fees or commissions for property which does not come into his hands, but which is in the possession of other parties who claim title to it, adversely to the estate, even though it is appraised and included in the inventory. *Estate of Simmons*, 43 Cal. 543. As affording a basis for the allowance of administrators' commissions, the value of the estate, which has been taken into possession, and having been in possession, has been accounted for, is alone to be regarded. *Estate of Simmons*, 43 Cal. 543.

1623. The Probate Court has no authority to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator. *Bush v. Lindsey*, 44 Cal. 121.

1634. If the account mentioned in the preceding section be for a final settlement, and the estate be ready for distribution, the notice of the settlement must state those facts, and must be served, published, or waived in the same manner as provided in section 1539 of this Code relating to sales of property; and, on confirmation of the final account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice or proceedings. If, from any cause, the hearing of the account or the partition and distribution be postponed, the order postponing the same to a day certain is notice to all persons interested therein.

Final settlement and distribution on notice.

Order postponing is notice.





Settlement  
of account,  
when and  
when not  
conclusive.

1637. The settlement of the account and the allowance thereof by the Court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor, or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is *prima facie* evidence of its correctness.

The presentation of an account of the affairs of a partnership and of a claim against the estate, by the surviving partner of a deceased person, made to the administrator, and an allowance of the same, and a final settlement of the administrator's account by the Probate Court, are a bar to an action afterward brought against the surviving partner to settle the copartnership affairs under the claim that the account rendered was fraudulent. *Kingsley v. Miller*, 45 Cal. 95.

Sale of personal in lieu  
of real property.

1639. Whenever it appears to the Court on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property should be first sold, the Court may decree the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

Order for  
investment  
of moneys.

1640. Pending the settlement of any estate on the petition of any party interested therein, the Probate Court may order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or of this State. Such order can only be made after publication of notice of the petition in some newspaper to be designated by the Judge.

1665. The inheritance is regulated by the law in force at the time of the death. *Rich v. Tubbs*, 41 Cal. 34. One half the common property vests in the surviving wife unaffected by any testamentary disposition he may have attempted to make of it. *Estate of Silvey*, 42 Cal.

211. The right or interest which a person held in the pueblo lands by virtue of possession alone, prior to the passage of the Van Ness ordinance, if not devised by him, descended to his heirs and could be distributed by the Probate Court. *McLeran v. Benton*, 43 Cal. 467.

1668. The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the Court may direct, and for such time as may be ordered. If partition be applied for, as provided in this chapter, the decree of distribution shall not divest the Court of jurisdiction to order partition, unless the estate is finally closed.

Decree to be made only after notice.

1698. The final settlement of an estate, as in this chapter provided, shall not prevent a subsequent issue of letters testamentary, or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued.

Discovery of property.

1704. Orders and decrees made by the Probate Court, or the Judge thereof, need not recite the existence of facts, or the performance of acts upon which the jurisdiction of the Court or Judge may depend; but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this Title. All orders and decrees of the Court or Judge must be entered at length in the minute book of the Court, and upon the close of each term the Judge must sign the minutes.

Orders and decrees, what to contain; must be entered at length.

1718. At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate and confirmations thereof; settlements, partitions, and distributions of estates; setting apart homesteads; and all other proceedings where all the parties interested in the estate are required to be notified thereof, the Court may, in its discretion, appoint some competent attorney

Court to appoint attorney for minor heirs, devisees, legatees or creditors, when; and what compensation he is to receive.







at law to represent, in all such proceedings, the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the State; and those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee to be fixed by the Court for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it become necessary, the Probate Court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings.

In proceedings to obtain an order for the sale of real estate belonging to the estate of a deceased person, it is the duty of the Probate Court to appoint an attorney for heirs not represented, and an attorney's fee of fifty dollars for such services is not unusual or excessive. *Estate of Simmons*, 43 Cal. 543. The appointment of an attorney to represent minor heirs who reside in the county and were not served with citations to appear, and the appearance of the attorney for such minor heirs are nullities, and do not give the Court jurisdiction. *Randolph v. Bayue*, 44 Cal. 366.

Decree relative to homestead.

1719. When a judgment or decree is made, setting apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the Recorder of the county in which the property is situated.

Personal service on guardian sufficient.

1722. (N. S.) Whenever an infant, insane, or incompetent person has a guardian of his estate residing in this State, personal service upon the guardian of any process, notice, or order of the Probate Court concerning the estate of a deceased person, in which the ward is interested, is equivalent to service upon the ward ;

and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward, and waive any process, notice, or order to show cause which an adult or a person of sound mind might do.

Appearance  
of guardian.

1737. It is the duty of every Public Administrator, as soon as he shall receive the same, to deposit with the County Treasurer of the county in which the probate proceedings are pending, all moneys of the estate not required for the current expenses of the administration; and such moneys may be drawn upon the order of the executor or administrator, countersigned by the Probate Judge, when required for the purposes of administration. It shall be the duty of the County Treasurer to receive and safely keep all such moneys, and pay them out upon the order of the executor or administrator, when countersigned by the Probate Judge, and not otherwise, and to keep an account with each estate of all moneys received and paid to him; and the County Treasurer shall be allowed one per cent upon all moneys received and kept by him, and no greater fees for any services herein provided. The moneys thus deposited may, upon order of the Probate Court, be invested pending the proceedings, in securities of the United States, or of this State, when such investment is deemed by the Court to be for the best interests of the estate. After a final settlement of the affairs of any estate, if there be no heirs or other claimants thereof, the County Treasurer shall pay into the State Treasury, all moneys and effects in his hands belonging to the estate, upon order of the Probate Court, and if any such moneys and effects escheat to the State, they must be disposed of as other escheated estates.

Duty of  
Public Ad-  
ministrator  
to deposit  
money with  
County  
Treasurer.

Duty of  
county  
treasurers.

1747. The Probate Judge of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors who have no guardian legally appointed by will, or deed, and who are inhabitants or residents of

Probate  
judge to  
appoint  
guardians,  
when and  
on what  
petition.





the county, or who reside without the State, and have estate within the county. Such appointment may be made on the petition of a relative or other person, in behalf of such minor. Before making such appointment, the Judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor.

1763. The power of the Probate Court to appoint a guardian for an insane person, is not defeated by the fact that such insane person is a married woman. Guardianship of Eliza Fegan, 45 Cal., 176. When an insane person is a wife, there is no rule of law which prefers the husband as such guardian, if he be unfit to discharge the duties of guardian. Id.

Proceedings  
for restora-  
tion to ca-  
pacity, of  
insane  
person.

1766. (N. S.) Any person who has been declared insane, or the guardian or any relative of such person, within the third degree, or any friend, may apply, by petition, to the Probate Judge of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane. Upon receiving the petition, the Judge must appoint a day for the hearing, and, if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in other cases in the Probate Court. The Judge shall cause notice of the trial to be given to the guardian of the petitioner, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the petitioner, and, in the discretion of the Judge, any other person, may contest the right of the petitioner to the relief demanded. Witnesses may be required to appear and testify, as in other cases, and may be called and examined by the Judge of his own motion. If it be found that the petitioner be of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease.

1769. See, generally, as to appearance of guardian. *Smith v. McDonald*, 42 Cal. 490.

1778. Every alienation of the property of a ward by a guardian, if made without an order of Court, is void; and it is of no import whether the purchaser has knowledge that it belongs to the ward or not. *De La Montagnie v. Union Ins. Co.*, 42 Cal. 291.

1798. The application must be made upon ten days notice to the resident executor, administrator, or guardian, if there be such, and upon such application, the non-resident guardian must produce and file a certificate, under the hand of the Clerk and seal of the Court from which his appointment was derived, showing: Proceedings on such removal.

1. A transcript of the record of his appointment;
2. That he has entered upon the discharge of his duties;
3. That he is entitled, by the laws of the State of his appointment, to the possession of the estate of his ward; or must produce and file a certificate under the hand and seal of the clerk of the Court having jurisdiction in the country of his residence of the estates of persons under guardianship, or of the highest Court of such country, that by the laws of such country the applicant is entitled to the custody of the estate of his ward without the appointment of any Court.

Upon such application, unless good cause to the contrary is shown, the Probate Judge must make an order granting to such guardian leave to take and remove the property of his ward to the State or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.

1819. A sole trader cannot claim exemption from liability as such on the ground that she permitted her husband to manage and control the business. *Porter v. Gamba*, 43 Cal. 105. The provision in sec. 3 of the Sole Trader Act (Stat. 1868, p. 108), that "nothing contained in this act shall be deemed to authorize a married woman to carry on business in her own name, when the same is managed or superintended







by her husband," was intended only for the protection of the creditors of the husband, and to prevent collusion and fraud between husband and wife, but not to shield the wife from her liability as sole trader. *Id.* There is no objection to a general judgment against a sole trader on a claim for which she, as such, is liable. *Id.*

1822. In an action to set aside a discharge in insolvency, because fraudulently obtained, a verdict, which finds that the insolvent did not turn over all his property to his assignee, does not necessarily establish that the property was fraudulently or purposely omitted from the schedule. *Tevis v. Hicks*, 41 Cal. 123. Insolvents' conveyance to certain creditors for themselves and others not an "assignment for the benefit of creditors." *Lawrence v. Neff*, 41 Cal. 566. There is nothing in section thirty-nine of the insolvent law (Stat. 1852, p. 69) prohibiting an insolvent debtor from conveying his property absolutely, or by way of security, directly to one or more of his creditors, to the exclusion of the remainder. *Id.* This section was aimed wholly at "assignments for the benefit of creditors," but a conveyance to the creditor himself is not an "assignment" in the sense of the statute. *Id.*

1825. The general rules of evidence are the same in both criminal and civil cases. *People v. Murphy*, 45 Cal 137.

Degrees of  
evidence  
specified.

1828. There are several degrees of evidence:

1. Primary and secondary;
2. Direct and indirect;
3. *Prima facie*, partial, satisfactory, indispensable, and conclusive.

Primary  
evidence  
defined.

1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

Secondary  
evidence  
defined.

1830. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents.

*Prima facie*  
evidence  
defined.

1833. *Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is *prima facie* evidence of a record, but it may afterward be rejected upon proof that there is no such record.

1848. The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another.

One person  
not affected  
by acts of  
another.

1850. The declarations of an agent are not admissible against his principal until the fact of his agency is first proven. *Grigsby v. Clear Lake W. Co.* 40 Cal. 396. Declaration of agent of corporation as evidence. *Green v. Ophir C. S. & G. M. Co.* 45 Cal. 522. The declaration of the president of a corporation may be received in evidence to show that at the time the corporation purchased land it had actual notice of a mortgage on the same. *Christy v. Dana*, 42 Cal. 175. Declaration of wife, acting as agent, when not part of *res gestæ*. *Bornheimer v. Baldwin*, 42 Cal. 27. In an action by the creditor of the husband to set aside a deed of gift made by a third person to the wife, on the ground that the land was purchased with the husband's money, and that the deed to the wife was a fraud, evidence of conversations at the time of the creditor sales, between the grantor and one who negotiated the sale is admissible, as part of the *res gestæ*. *Tavis v. Hicks*, 41 Cal. 123. The admissibility of such testimony does not depend on the question whether the conversation was brought home to the husband, as it does not affect him unless the negotiation was his agent's. *Id.*

1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties.

Evidence  
relating to  
third per-  
son.

1853. Declarations of a person since deceased, not against but in support of his own interest, are not admissible in evidence in favor of those who claim rights which the declarations would maintain. *Poorman v. Mitler*, 44 Cal. 269.

1855. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

Contents of  
writing,  
how proved.

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;





4. When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute ;

5. When the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced ; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents.

**1855.** Generally : Parol testimony is not admissible to vary the terms of a decree of divorce, or change the rights of the parties thereunder. *Wilson v. Wilson*, 45 Cal. 399. Showing the original verdict of a coroner's jury to a witness in a criminal case and asking the witness if he had signed the verdict, is not "an effort to prove the contents of a written record by parol." *People v. Donovan*, 43 Cal. 162.

(Subd. 1.) Before parol evidence of the contents of a deed is admissible it must be shown to have been lost or destroyed. *Poorman v. Miller*, 44 Cal. 269. A former deed is the best evidence of its contents, but if lost or destroyed parol evidence of its contents is admissible. *Id.* In such case the declarations of the grantor and grantee in the later deed that it was made in lieu of the former deed are not admissible to lay the foundation for the admission of the later deed for the purpose of fixing the boundaries of the land conveyed in the former deed. *Id.*

**1856.** The rule that parol evidence cannot be received to vary or contradict a written contract applies only to controversies between parties to the contract, their representatives, and those claiming under them, and has no application to a controversy to which a stranger is a party. *Smith v. Moynihan*, 44 Cal. 53. A contract expressed in a deed is not to be enlarged by parol. *Ward v. McNaughton*, 43 Cal. 159.

**1860.** Parol testimony is admissible to explain the calls in a deed. *Altschul v. S. F. C. P. H. A.*, 43 Cal. 173. Or to explain a doubtful call. *Id.*

**1868.** The appellate Court will not presume that any evidence was received except such as was pertinent to the issues. *Gregory v. Nelson*, 41 Cal. 278. Circumstances and relation of the parties, competent evidence. *Barstow v. City R. R. Co.*, 42 Cal. 467. Evidence of the pecuniary standing and ability of a person is competent on an issue as to whether he is in equity the owner of the land, the title to which has been taken in his name. *Hobbs v. Duff*, 43 Cal. 487. The evidence must correspond with the allegations. *Tavis v. Hicks*, 41 Cal. 123.

Evidence not admissible to controvert facts admitted by the pleadings. *Patterson v. Sharp*, 41 Cal. 133.

**IN PARTICULAR ACTIONS.**—Evidence admissible in action for loss or injury by negligence. *Cleland v. Thornton*, 43 Cal. 437. In action for injury or death caused by wrongful act. *Taylor v. W. P. R. R. Co.*, 45 Cal. 323. Of title to land. *Lick v. Diaz*, 44 Cal. 479.

**1870.** (Subd. 3.) Evidence of the acts and exclamations of the wife of the prisoner, made and performed at the time of the killing, and in his presence, a hearing is admissible on behalf of the prosecution. *People v. Murphy*, 45 Cal. 137.

(Subd. 4.) Declarations of deceased made three or four days before he was killed, which do not have any appreciable bearing on the merits of the case, are not admissible in murder cases, on behalf of the defence. *People v. Murphy*, 45 Cal. 137. Statements of deceased concerning the circumstances attending the difficulty in which he was wounded, made three days after he was wounded, but when he was in his right mind, and did not expect to die, not admissible in evidence for defendant. *People v. McLaughlin*, 44 Cal. 435. The testimony of a witness, since deceased, given on a former trial in a criminal case, may be proved on a subsequent trial, by permitting a person who kept notes of such testimony, and who swears they contain the substance of the testimony, to read his notes to the jury. *People v. Murphy*, 45 Cal. 137.

(Subd. 5.) A party who sues two persons as partners, one of whom answers, denying the partnership, cannot, to prove the partnership as against the defendant denying it, introduce in evidence an answer of the defendant, admitting the partnership, filed in another case between the two defendants. *Etcheborne v. Stearns*, 44 Cal. 582.

**1875.** Generally, if the Court excludes a remittitur as evidence on the ground that it will take judicial notice of it, the presumption is, that it did take judicial notice of it. *Gambert v. Hart*, 44 Cal., 542.

(Subd. 5.) Genuineness of official signatures of officers and their deputies. *Lucas v. City of Marysville*, 44 Cal. 210.

**1879.** No person is to be held incompetent as a witness, on account of his opinions on matters of religious belief. *People v. Sanford*, 43 Cal. 34. This rule to apply to dying declarations. The common law in this respect abrogated. *People v. Sanford*, 43 Cal. 29. Evidence of party in interest. *Marquart v. Bradford*, 43 Cal. 526. Party as witness on his own behalf. *People v. McCanley*, 45 Cal. 146.

**1880.** The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

Persons  
who cannot  
testify.











of a Board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation;

6. Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof;

7. Documents of any other class in a sister State, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the Secretary of State, Judge of the Supreme, Superior, or County Court, or Mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original;

8. Documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original;

9. Documents in the departments of the United States Government, by the certificate of the legal custodian thereof.

1919. Certified copy of recorded contract as evidence. *Moss v. Atkinson*, 44 Cal. 3.

Entries in  
official  
books prima  
facie evi-  
dence.

1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts stated therein.

Official  
certificates,  
contents of.

1923. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a Court having a seal, under the seal of such Court.

**1924.** The provisions of the preceding sections of this article applicable to the public writings of a sister State, are equally applicable to the public writings of the United States, or a Territory of the United States.

Provisions in relation to States, apply to U. S. and U. S. Territories.

**1925.** Certificate of Receiver of U.S. Land Office. McDonald v Edwards, 44 Cal. 328.

**1926.** An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated in such entry.

Entries made by officers and Board, *prima facie* evidence.

**1931.** A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister State or foreign country, and there recognized as a seal, must be so regarded in this State.

Public and private seals, how made.

Scroll or sign.

**1932.** There shall be no difference hereafter, in this State, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged by a writing not under seal.

Distinction between sealed and unsealed instruments, abolished.

**1936.** Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are *prima facie* evidence of facts of general notoriety and interest.

Books, maps, etc., how far evidence.

**1940.** Any writing may be proved either:

Writing, how may be proved.

1. By any one who saw the writing executed; or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness.

1941



Evidence of handwriting by comparison.

1944. Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the Judge.

Entries of decedents, evidence in specified cases.

1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as *prima facie* evidence of the facts stated therein, in the following cases:

- I. When the entry was made against the interest of the person making it;
2. When it was made in a professional capacity, and in the ordinary course of professional conduct;
3. When it was made in the performance of a duty specially enjoined by law.

Private writings acknowledged and certified.

1948. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is *prima facie* evidence of the execution of the writing, in the same manner as if it were a conveyance of real property.

1949 of said Code is repealed.

Public records not to be carried about.

1950. The record of a conveyance of real property, or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a Court, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the Court is held in the same building with such office.

Certified copies, or copies of record, admissible without further proof.

1951. (N. S.) Every instrument conveying or affecting real property, acknowledged, or proved, and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in



evidence, in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may also be read in evidence, with the like effect as the original, on proof, by affidavit, or otherwise, that the original is not in the possession or under the control of the party producing the certified copy.

1969. A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given.

Will, to be  
in writing.

1970. A written will cannot be revoked or altered otherwise than as provided in the Civil Code.

Will, how  
revoked.

Vide Civil Code §1292.

1982. After a deed is admitted in evidence, in ejectment, it is necessary, for the party claiming under it, to show that it embraces the premises in controversy. *Walbridge v. Ellsworth*, 44 Cal. 353. Where a claim, which has been assigned to a defendant in an action, and paid by him, is offered in evidence as an offset, the burden of proof, as to the settlement of the claim by plaintiff, rests upon the plaintiff. *Saxton v. Kneeland*, 45 Cal. 116. Burden of proof in divorce on ground of adultery. *Evans v. Evans*, 41 Cal. 103. Burden of proof of true consideration of note. *Bond v. Davenport*, 44 Cal. 482. Of title in ejectment. *Brown v. Brackett*, 45 Cal. 167.

2011. If such affidavit be made in an action or special proceeding pending in a Court, it may be filed with the Court or a Clerk thereof. If not so made, it may be filed with the Clerk of the county where the newspaper is printed. In either case the original affidavit, or a copy thereof, certified by the Judge of the Court or Clerk having it in custody, is *prima facie* evidence of the facts stated therein.

Where filed.

2013. An affidavit taken in another State of the United States, to be used in this State, may be taken before a Commissioner appointed by the Governor of this State to take affidavits and depositions in such

If made in  
another  
State, be-  
fore whom  
taken.





other State, or before any Notary Public in another State, or before any Judge or Clerk of a Court of record having a seal.

If made in a foreign country, before whom taken.

2014. An affidavit taken in a foreign country to be used in this State, may be taken before an Ambassador, Minister, Consul, Vice Consul, or Consular Agent of the United States, or before any Judge of a Court of record having a seal, in such foreign country.

Testimony of witness out of State, taken upon commission issued under seal, upon notice.

To whom issued.

2024. The deposition of a witness out of this State may be taken upon commission issued from the Court, under the seal of the Court, upon an order of the Judge or Court, or County Judge, on the application of either party, upon five days previous notice to the other. If issued to any place within the United States, it may be directed to a person agreed upon by the parties, or if they do not agree, to any Judge or Justice of the Peace, or Commissioner, selected by the officer issuing it. If issued to any country out of the United States, it may be directed to a Minister, Ambassador, Consul, Vice Consul, or Consular Agent of the United States in such country, or to any person agreed upon by the parties.

2042. After a motion for an order has been argued and submitted, the Court may, at its discretion, set aside the order of submission and allow more evidence to be introduced. *Keys v. Warner*, 45 Cal. 60. Admission of testimony after close in chief in discretion. *Foote v. Richmond*, 42 Cal. 441.

2052. A qualification of the rule governing the impeachment of witnesses by proof of contradictory statements elsewhere made by them, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relative to the issue being tried. *People v. Devine*, 44 Cal. 452. The value of the opinion of a witness may be tested by showing that on a former occasion he has expressed a different opinion, and by inquiring as to the grounds on which the change in his opinions had been brought about. *People v. Donovan*, 43 Cal. 162. Recalling witness to contradict testimony conflicting with his own. *Phelps v. McGloan*, 42 Cal. 301.

**2061.** The question of the credibility of a witness is for the Court below, and not for the Appellate Court, to determine. *Walsworth v. Johnson*, 41 Cal. 61; see *Saxton v. Kneeland*, 45 Cal. 116; see, generally: *Effect of Evidence*. *Poppe v. Athearn*, 42 Cal. 607; *Hobbs v. Duff*, 43 Cal. 487; *Reed v. Swift*, 45 Cal. 255.

**2075.** Receipt of person not a party, when admissible. *Locke v. Porter G. & S. M. Co.*, 41 Cal. 305.

**2077.** The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful, and there are no other sufficient circumstances to determine it:

Rules for  
construing  
descriptions of  
land.

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars;

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both;

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title;

5. When tide water is the boundary, the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance;

6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars.





When, in a partition judgment, a boundary line between two of the parties is described as passing along a visible object, and is also described by courses and distances, the latter must yield to the former. *Mills v. Lusk*, 45 Cal. 273.

2079. Confessions or admissions of defendant, admissible in divorce. *Evans v. Evans*, 41 Cal. 103.

Manner of  
application  
for order.

2084. The applicant must produce to a District Judge, or to a County Judge, a petition, verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a Court in this State, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which it may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved.

The Judge, to whom such petition is presented, must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this State, must be personally served, and if unknown, such notice must be served on the Clerk of the county where the property to be affected by the evidence is situated, or the Judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the Judge, for the same period required for the publication of summons. The Judge must also designate in his order the Clerk of the county to whom the depositions must be returned when taken.



Affidavits when not admissible in evidence. *Etchemende v. Stearns*, 44 Cal. 582.

2085. The person appointed by the Judge to take the depositions is authorized, if a resident of this State, on receiving a copy of the order of the Judge, and of the notice prescribed in the last section, with proof of its personal service or publication; or, if a resident without the State, on receiving the commission mentioned in the next section, with proof of like service of publication of the notice; to take the deposition of the witness named in the order of the Judge, or in the commission, or, if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time.

Appointee  
of Judge,  
authority  
of.

See, generally: *People v. Devine*, 44 Cal. 452.

2086. The examination must be by question and answer, and if the testimony is to be taken in another State, it must be taken upon a commission to be issued by the Judge allowing the examination, under the seal of the Court of which he is Judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the Judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the Clerk of the county designated in the order of the Judge allowing the examination, who shall file the same when received. The Judge allowing the examination, shall file with the Clerk the order for the examination, the petition on which the same was granted, with proof of service of the order and notice.

Manner of  
taking the  
deposition.





Papers filed,  
prima facie  
evidence.

2087. The petition and order, and papers filed by the Judge, as provided in §2086, or a certified copy thereof, are *prima facie* evidence of the facts stated therein to show compliance with the provisions of this chapter.

When the  
evidence  
may be pro-  
duced.

2088. If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death, or insanity of the witness, or that they cannot be found, or are unable, by reason of age or other infirmity, to give their testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attend at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination.

Form of  
ordinary  
oath to a  
witness.

2094. An oath, or affirmation, in an action or proceeding, may be administered as follows, the person who swears, or affirms, expressing his assent when addressed in the following form: "You do solemnly swear (or affirm, as the case may be), that the evidence you shall give in this issue (or matter), pending between —— and ——, shall be the truth, the whole truth, and nothing but the truth, so help you God."

Questions  
of fact,  
when to be  
decided by  
jury.

2101. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code.

Moneys  
deposited  
in court,  
to whom  
delivered.  
Duty of  
Clerk and  
County  
Treasurer.

2104. (N. S.) Whenever moneys are paid into or deposited in Court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the County Treasurer, to be

held by him, subject to the order of the Court. The Treasurer shall keep each fund distinct, and open an account with each. Such appointment shall be filed with the County Treasurer, who shall exhibit it and give to each person applying for the same, a certified copy of the same. It shall be in force until a revocation in writing is filed with the County Treasurer, who shall thereupon write "Revoked," in ink, across the face of the appointment.

All provisions of law inconsistent with the provisions of this Act, are hereby repealed ; but no rights acquired or proceedings taken under the provisions repealed, shall be impaired, or in any manner affected by this repeal ; and whenever a limitation or period of time prescribed by such repealed provisions for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Act takes effect, and the same or any other limitation is prescribed by this Act, the time which shall have run when this Act takes effect shall be deemed part of the time prescribed by this Act.

Repealing  
clause.

Rights pre-  
served.

This Act takes effect on the first day of July, one thousand eight hundred and seventy four.









## TERMS OF COUNTY AND PROBATE COURTS.

COUNTY.	COUNTY COURTS.	PROBATE COURTS.
Alameda.....	1st Monday January, April, July; 3d Monday Sept.	Same as County Court.
Alpine.....	1st Monday February, June, October.....	Same as County Court.
Amador.....	1st Monday February, May, August, November.....	Same as County Court.
Butte.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Calaveras.....	1st Monday March, June, September, December...	Same as County Court.
Colusa.....	1st Monday January, April; 3d Monday July, Oct.	Same as County Court.
Contra Costa.....	1st Monday March, August, November..	Same as County Court.
Del Norte.....	1st Monday April, July, October.....	Same as County Court.
El Dorado.....	2d Monday March, June, September, December...	2d Jan. April, July, Oct.
Fresno.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Humboldt.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Inyo.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Kern.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Klamath.....	1st Monday April, July, October.....	Same as County Court.
Lake.....	1st Monday January, April, July, October.....	Same as County Court.
Lassen.....	1st Monday February, May, August, November...	Same as County Court.
Los Angeles.....	1st Monday, January, March, May, July, Sept. Nov.	Same as County Court.
Marin.....	3d Monday March, June, September, December...	Same as County Court.
Mariposa.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Mendocino.....	1st Monday March, June, September, December...	Same as County Court.
Merced.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Modoc.....	1st Monday February, June, October.....	When necessity requires.
Mono.....	1st Monday January; May, September.....	Same as County Court.
Monterey.....	1st Monday, March, May, July, Sept. November..	1st Monday of each month.
Napa.....	1st Monday March, September, Dec.; 3d Mon Jun.	Same as County Court.
Nevada*.....	1st Monday February, May, August, November...	1st Monday of each month.
Placer.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Plumas.....	1st Monday March, June, September, December..	Same as County Court.
Sacramento.....	1st Monday January, April, July, October.....	Same as County Court.
San Benito... ..	1st Monday Feb. May; 3d Mon. Aug.; 1st M. Nov..	1st Monday of each month.
San Bernardino..	1st Monday January, March, May, July, Sept. Nov.	4th Monday of each month.
San Diego.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
San Francisco....	1st Monday January, March, May, July, Sept. Nov.	1st Monday of each month.
San Joaquin.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
San Luis Obispo..	1st Monday March, June, 3d M. Aug.; 1st M. Dec.	Same as County Court.
San Mateo.....	2d Monday March, June, September, December...	Same as County Court.
Santa Barbara...	1st Monday March, June, September, December...	Same as County Court.
Santa Clara.....	3d Monday February, May, August, November....	1st Monday of each month.
Santa Cruz.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Shasta.....	1st Monday January, May, September.....	1st M. Feb. Apr. June, Aug. Oct. Dec.
Sierra.....	3d Monday April, June, Sept.; 2d Mon. December.	1st Monday of each month.
Siakiyou†.....	1st Monday Jan'y; March, May, July,* Sept. Nov.	Same as County Court.
Solano.....	3d Monday April, August, December.....	Same as County Court.
Sonoma... ..	1st Monday January, April, July, October.....	1st Monday of each month.
Stanislaus.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Sutter.....	1st Monday January, April, July, October.....	1st Monday of each month.
Tehama.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Trinity.....	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Tulare.....	1st Monday March, June, September, December..	Same as County Court.
Tuolumne.....	1st Monday January, May, September.....	4th Monday of each month.
Ventura.....	1st Monday February, July, October.....	When necessity requires.
Yolo.....	1st Monday January, April, July, October, .....	Same as County Court.
Yuba.....	1st Monday January, April, July; 2d Monday Oct.	1st Monday of each month.

Terms of San Francisco Municipal Court—First Monday January, March, May, July September and November.

\*Sessions may be held at Truckee, at the discretion of the Judge. †At Lake City, second Monday of July.

# TERMS OF DISTRICT COURTS.

COUNTY.	DISTRICT.	DISTRICT COURTS.
Alameda .....	Third .....	3d Monday February, June, and October.
Alpine .....	Sixteenth .....	1st Monday April and October.
Amador .....	Eleventh .....	2d Monday March, June, September, and December.
Butte .....	Second .....	1st Monday March, 3d Monday November, 2d Monday July.
Calaveras .....	Eleventh .....	2d Monday January, April, July, and October.
Colusa .....	Tenth .....	4th Monday April, 2d Monday August, 1st Monday December.
Contra Costa .....	Fifteenth .....	3d Tuesday April, July, and November.
Del Norte .....	Eighth .....	2d Monday May, August, and November.
El Dorado .....	Eleventh .....	2d Monday February and May, 3d Monday August and November.
Fresno .....	Thirteenth .....	3d Monday February, June, and October.
Humboldt .....	Eighth .....	2d Monday March, June, September, and December.
Inyo .....	Sixteenth .....	1st Monday May and November.
Kern .....	Sixteenth .....	3d Monday May and November.
Klamath .....	Eighth .....	2d Monday April, July, and October.
Lake .....	Seventh .....	3d Monday April, 2d Monday November.
Lassen .....	Second .....	2d Monday June, 2d Monday September.
Los Angeles .....	Seventeenth .....	1st Monday February, May, August, and November.
Marin .....	Seventh .....	1st Monday March and July. 3d Monday November.
Mariposa .....	Thirteenth .....	3d Monday April, 3d Monday August, 2d Monday December.
Mendocino .....	Seventh .....	2d Monday April, 3d Monday July, 1st Monday November.
Merced .....	Thirteenth .....	3d Monday March, July, and November.
Modoc .....	Ninth .....	2d Monday July, 3d Monday October.
Mono .....	Sixteenth .....	3d Monday April and October.
Monterey .....	Twentieth .....	3d Monday March, July, and November.
Napa .....	Seventh .....	1st Monday February, June, and October.
Nevada .....	Fourteenth .....	2d Monday March, June, September, and December.
Placer .....	Fourteenth .....	1st Monday February, May, August, and November.
Plumas .....	Second .....	4th Monday May, 1st Monday October.
Sacramento .....	Sixth .....	1st Monday February, April, June, August, October, and December.
San Benito .....	Twentieth .....	1st Monday April, August, and December.
San Bernardino .....	Eighteenth .....	2d Monday March, June, September, and December.
San Diego .....	Eighteenth .....	2d Monday January, April, July, and October.
San Francisco .....	.....	3d D. O.—3d Monday April, Aug., Dec. 4th—1st Monday Feb., May, Aug., Dec. 12th—1st Monday Jan., April, July, Oct. 15th—1st Monday March, June, Sept., Dec. 19th—1st Monday April, Aug., and Dec.
San Joaquin .....	Fifth .....	1st Monday February, May, August; 3d Monday October.
San Luis Obispo .....	First .....	2d Monday May, September, and January.
San Mateo .....	Twelfth .....	2d Monday February, 4th Monday May, August, and November.
Santa Barbara .....	First .....	3d Monday March, July, and November.
Santa Clara .....	Twentieth .....	1st Monday January, May, and September.
Santa Cruz .....	Twentieth .....	2d Monday February, June, and October.
Shasta .....	Ninth .....	2d Monday March, June, and November.
Sierra .....	Tenth .....	1st Monday April, 2d Monday July, 4th Monday October.
Siskiyou .....	Ninth .....	3d Monday January, May, and September. At Lake City—2d Monday July.
Solano .....	Seventh .....	3d Monday January, May, and September.
Sonoma .....	Seventh .....	3d Monday February, June, and October.
Stanislaus .....	Fifth .....	2d Monday January, April, and September.
Sutter .....	Tenth .....	4th Monday February, 3d Monday June, 2d Monday November.
Tehama .....	Second .....	4th Monday October, 4th Monday January, 1st Monday May.
Trinity .....	Ninth .....	2d Monday April, August, and December.
Tulare .....	Thirteenth .....	3d Monday January, May, and December.
Tuolumne .....	Fifth .....	1st Monday March and July, 3d Monday November.
Ventura .....	First .....	1st Monday March, July, and November.
Yolo .....	Sixth .....	3d Monday January, May, and September.
Yuba .....	Tenth .....	3d Monday January, 3d Monday May, 1st Monday October.

**AMENDMENTS**  
**TO THE**  
**POLITICAL CODE,**

**ENACTED AT THE TWENTIETH LEGISLATIVE  
SESSION, 1873-4.**

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**UNLESS OTHERWISE STATED AT THE CLOSE OF THE SECTION, THESE  
AMENDMENTS TAKE EFFECT JULY 1st, 1874.**

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9. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code. **Limitations  
shall con-  
tinue to run.**

11. If the first day of January, the twenty-second day of February, the fourth of July, or the twenty-fifth day of December, fall upon a Sunday, the Monday following is a holiday. **Holidays.**

16. It is the general rule in the interpretation of Constitutions and Statutes that words shall be taken in the ordinary and popular sense, unless the context shows that the words are used in a technical, or some arbitrary sense. *People v. Eddy*, 43 Cal. 331. See, generally: *Palache v. Pacific Ins. Co.*, 42 Cal. 425; *Appeal of Houghton*, 42 Cal. 35; *Randolph v. Bayne*, 44 Cal. 366; *S. & V. R. R. Co. v. Stockton*, 41 Cal. 148; *In re Bulger*, *In re Merrill*, 45 Cal. 553.

(Subd. 5.) Meaning of the word "Property" in section thirteen, article eleven of the Constitution. *People v. Eddy*, 43 Cal. 331.





Words  
what they  
include.

17. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing; oaths includes affirmation or declaration; every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose;" signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness. The following words, also, have in the Code the signification attached to them in this section, unless otherwise apparent in the context:

1. The word "property" includes both real and personal property;

[2.] The words "real property" are coextensive with lands, tenements, and hereditments;

3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt;

4. The word "month" means a calendar month, unless otherwise expressed;

5. The word "will" includes codicils;

6. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a Court or judicial officer; and the word "process," a writ or summons issued in the course of judicial proceedings;

7. The word "vessel," when used in reference to shipping, includes ships of all kinds, steamboats and steamships, canal boats, and every structure adapted to be navigated from place to place;

8. The term "peace officer" signifies any of the officers mentioned in section eight hundred and seventeen of the Penal Code;

9. The term "magistrate" signifies any one of the officers mentioned in section eight hundred and eight of the Penal Code;

10. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories; and the words "United States" may include the District and Territories.

19. Constitutionality of Subsidy Act of Stockton City Railroad. *S. & V. R. R. v. Stockton*, 41 Cal. 147.

(Subd. 1.) Power of Legislature over municipal offices. In re Bulger, In re Merrill, 45 Cal. 553. The Act of 1863, which declares that "the Board of Supervisors of Sacramento County shall be a body politic and corporate, does not make that county a municipal corporation within the meaning of that term as used in this section." *People v. Sacramento County*, 45 Cal. 692.

37. Power of State to exclude paupers, etc., from its limits. *State v. S. S. Constitution*, 42 Cal. 581.

44. The Legislature may prescribe the several steps to be pursued in the assertion of the right to compensation for land condemned. *Potter v. Ames*, 43 Cal. 75.

58. An Act to make women eligible to educational offices.  
[Enacting clause.]

Women, over the age of twenty-one years, who are citizens of the United States and of this State, shall be eligible to all educational offices within the State, except those from which they are excluded by the Constitution. [Approved March 12, 1874. Immediate effect.]

60. Effect of Fourteenth and Fifteenth Amendments to the Constitution of the United States upon the status of Citizenship. *Van Valkenburg v. Brown*, 43 Cal. 43.

182. From the county-seat of Inyo County to Sacramento, four hundred and sixty-five miles; to Stockton, four hundred and seventeen miles; to San Quentin, five hundred and forty-seven miles. [Approved February 4, 1874.] Inyo.

194. From the county seat of Sutter County to Sacramento, fifty miles; to Stockton, ninety-five miles; to San Quentin, one hundred and eighty miles. Sutter.







220. When the statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of power. *Cowell v. Martin*, 43 Cal: 605. When the State by legislative act confers upon a Board of Public Officers jurisdiction to exercise their judgment and discretion upon matters within their power to perform, the Courts cannot renew the question whether that discretion was properly exercised. *Porter v. Haight*, 45 Cal. 631.

Certificate  
of election  
evidence of  
right to  
seat.

236. The certificate of election is *prima facie* evidence of the right to membership.

6. All persons who, at the time this Code takes effect, hold office under any of the Acts repealed, continue to hold the same according to the tenure thereof, except those offices which are not continued by one of the Codes adopted at this session of the Legislature, and excepting offices filled by appointment.

Statement  
of cause of  
contest to  
be filed.

274. The person contesting such election must, within twenty days after the certificate of election is issued, file with the clerk of the county, or one of the counties in which the alleged cause of contest originated, a statement of the grounds of contest, verified by his oath.

Service of  
subpoenas.

301. The subpoena may be served by any person who might be a witness in the matter, and his affidavit that he delivered a copy to the witness, is evidence of service.

328. The repeal of an Act repealing a former Act does not revive the former Act or give it any force or effect. To revive such former Act it must be re-enacted. *People v. Hunt*, 41 Cal. 435.

Number to  
be printed.

834. There must be printed:

Of the report of the Secretary of State, twelve hundred copies;

Of the report of the State Controller, two thousand six hundred and forty copies;

Of the report of the State Treasurer, two thousand one hundred and sixty copies;

Of the report of the Surveyor General, five thousand two hundred and eighty copies;

Of the report of the Superintendent of Public Instruction, five thousand two hundred and eighty copies;

Of the report of the Attorney General, twelve hundred copies;

Of the report of the Adjutant General, twelve hundred copies;

Of the report of the State Librarian, twelve hundred copies;

Of the report of the Fish Commissioners, twelve hundred copies;

Of the report of the Directors, Resident Physician, Visiting Physicians of the Insane Asylum, two thousand four hundred copies;

Of the report of the Directors of the State Prison, two thousand four hundred copies;

Of the report of the State Board of Equalization, two thousand four hundred copies;

Of the report of the State Capitol Commissioners, twelve hundred copies;

Of the report of the State Board of Harbor Commissioners, twelve hundred copies;

Of the report of the Regents of the University of California, two thousand four hundred copies;

Of the report of the Directors of the State Agricultural Society, twelve hundred copies;

Of the report of the Tide Land Commissioners, twelve hundred copies.

Of the report of the Trustees of the Asylum for the Deaf, Dumb and Blind, twelve hundred copies;

Of the report of the State Board of Health, two thousand four hundred copies.

335. The reports printed must be delivered by the State Printer, as follows: Distribution of

To the Governor, fifty copies of each report;

To the State Treasurer, ten copies of each report;

To the Secretary of State, thirty copies of each report;

To the Superintendent of Public Instruction, two thousand five hundred copies of his report, for distribu-





tion to School Trustees and school teachers throughout the State, and for exchange with other States;

To the Surveyor General, one thousand copies of his report, for distribution to the County Surveyors, Assessors, and County Clerks of the several counties, and for exchange with other States;

To the Adjutant General, five hundred copies of his report, to be distributed at his discretion;

To the Attorney General, one hundred copies of his report, for distribution to the several District Attorneys of the State;

To the Controller, two hundred copies of his report;

To the Secretary of State, two hundred copies of his report;

To the State Treasurer, one hundred copies of his report;

To the State Librarian, two hundred copies of his report;

To the officers of the Insane Asylum, two hundred copies of their report;

To the Directors of the State Prison, one hundred copies of their report;

To the Regents of the University of California, two hundred copies of their report;

To the Trustees of the Asylum for the Deaf, Dumb and Blind, five hundred copies of their report;

To the Fish Commissioners, two hundred copies of their report;

To the State Board of Equalization, two hundred copies of their report;

To the officers of the State Agritultural Society, two hundred copies of their report;

To the State Board of Health, two hundred copies of their report;

And the remaining copies thereof, one third to the order of the Sergeant-at-Arms of the Senate, and two thirds to the order of the Sergeant-at-Arms of the Assembly, to be by them distributed pro rata, to the members of the Senate and Assembly next to convene.

337. Of the report of the Insurance Commissioner, the Commissioner must have printed, at the expense of his office, one thousand copies, and must deliver of the same as follows:

Report of Insurance Commissioner to be printed and distributed.

To the Governor, twenty copies;

To the State Librarian, ten copies;

To the Secretary of State, thirty copies;

To the Sergeant-at-Arms of the Senate, eighty copies;

To the Sergeant-at-Arms of the Assembly, one hundred and sixty copies;

And the residue must be distributed by the Commissioner in furtherance of the interest of insurance.

437. Whenever any person has received moneys, or has money or other personal property which belongs to the State by escheatment or otherwise, or has been intrusted with the collection, management, or disbursement of any moneys, bonds, or interest accruing therefrom, belonging to or held in trust by the State, and fails to render an account thereof to and make settlement with the Controller within the time prescribed by law, or when no particular time is specified, fails to render such account and make settlement, or who fails to pay into the State Treasury any moneys belonging to the State upon being required so to do by the Controller, within twenty days after such requisition, the Controller must state an account with such person, charging twenty-five per cent. damages, and interest at the rate of ten per cent. per annum from the time of failure; a copy of which account in any suit therein is *prima facie* evidence of the things therein stated. But in case the Controller cannot for want of information state an account, he may in any action brought by him aver that fact, and allege generally the amount of money or other property which is due to or which belongs to the State.

Proceedings against defaulters.

443. The State Controller must, between the tenth day of August and the first day of September of each year, estimate the amount necessary to raise the sum

Controller to make annual estimate for school expenses.







of seven dollars for each census child, between the ages of five and seventeen years, in this State, which shall be the amount necessary to be raised by ad valorem tax for school purposes during the year; which amount the Controller must immediately certify to the State Board of Equalization.

General  
duties of  
Insurance  
Commis-  
sioner.

595. The Insurance Commissioner must receive all bonds and securities of persons engaged in the transaction of insurance business in this State, and file and safely keep the same in his office, or deposit them as provided in this Article. He must examine and inspect the financial condition of all persons engaged, or who desire to engage, in the business of insurance; issue a certificate of authority to transact insurance business in this State, to any persons in a solvent condition who have fully complied with the laws of this State; determine the sufficiency and validity of all bonds, and other securities, required to be given by persons engaged or to be engaged in insurance business, and cause the same to be renewed in case of the insufficiency or invalidity thereof; and perform all other duties imposed upon him by the laws regulating the business of insurance in this State, and enforce the execution of such laws; prepare and furnish on demand, to all persons engaged in the insurance business, blank forms for such statements or reports as may by law be required of them; make, on or before the first day of August, in each year, a report to the Governor of this State, containing a tabular statement and synopsis of the reports which have been filed in his office, showing generally the condition of the insurance business and interests in this State, and other matters concerning insurance, and a detailed statement, verified by oath, of the moneys and fees of office received by him, and for what purpose. And whenever any insurance company doing business in this State shall voluntarily surrender to the Insurance Commissioner its certificate of authority previously granted, thereby withdrawing from

business in the State, the Commissioner must make due publication of such surrender and withdrawal, daily, for the period of one month, in some newspaper published in the city of San Francisco.

596. No person must transact insurance business in this State without first procuring from the Insurance Commissioner a certificate of authority, as in this chapter provided; and all policies issued or renewed, and all insurance taken before the issuing of such certificate, are null and void; and any person issuing or renewing a policy without such certificate, shall forfeit to the people of the State of California the sum of one hundred dollars for each policy so issued or renewed, to be collected in the manner prescribed in section five hundred and ninety-eight of this Code.

Business of insurance not to be transacted without his certificate.

596. No person must transact insurance business in this State without first procuring from the Insurance Commissioner a certificate of authority, as in this chapter provided; and all policies issued or renewed and all insurances taken before obtaining such certificate of authority are null and void; and any person issuing or renewing a policy without such certificate shall forfeit to the people of the State of California the sum of ten thousand dollars for each policy so issued or renewed, to be collected by the Insurance Commissioner in the manner prescribed in section five hundred ninety-eight of this Code. But any company or corporation belonging to any other State or county having policies of life insurance outstanding in this State, and that were issued in accordance with the laws of the State, shall have the right to maintain an agent in this State for the collection of renewal premiums on such policies; and the Commissioner is hereby authorized to issue to the duly appointed agent of such company or corporation a certificate, authorizing him to collect such premiums. But the company or corporation must satisfy the Commissioner that it is authorized to transact insurance business in the State to which it belongs. The agent

Penalty.

Foreign insurance companies.





must, on or before the tenth day of January, in each year, file with the Court a statement, under oath, showing the gross amount of premiums collected by him during the year ending on the thirty-first day of December next preceding, and upon filing such statement he must pay into the office of the Commissioner the sum of twenty dollars in gold coin of the United States. [Approved March 30, 1874, sixty days.]

600. The Insurance Commissioner may, under the act (Stat. 1867-8, p. 336), legally require an insurance company ascertained by him to be insolvent, as therein provided, to repair its capital stock without revoking its certificate. *Palache v. Pacific Ins. Co.*, 42 Cal. 421.

What constitutes insolvency.

602. Whenever provision for the liabilities of any person engaged in the insurance business in this State, for losses reported, expenses, taxes, and reinsurance of all outstanding risks estimated at fifty per cent. of the premiums received and receivable on all fire risks and marine time risks, at the full premiums received and receivable on all other marine risks, and at rates for life risks, based upon the rate of mortality established by the American Experience Life Table, and interest at four and one half per cent. per annum, and such rates for accident and other kinds of insurance, as are accepted by the insurance authorities of the State of New York, would so far impair his capital stock paid in as to reduce the same below two hundred thousand dollars in gold coin of the United States, or below twenty per cent. of said capital stock paid in, such person is insolvent. And in the case of a person thus engaged in the insurance business in this State, on the mutual plan, if his available cash assets shall not exceed his liabilities, as hereinbefore enumerated, in the full sum of two hundred thousand dollars in United States gold coin, such person is insolvent.

Statement to be made by insurance companies.

610. The Commissioner must require from every corporation or person doing business of insurance in this State, a statement, verified as follows:

1. If it be made by a corporation organized under the laws of this State, by the oaths of the President and Secretary, or of the Vice President and Secretary thereof;

2. If made by a foreign insurance company or person, by the oath of the principal executive officer thereof;

3. If it be made by an individual or firm, by the oath of such individual or a member of the firm.

611. The statement mentioned in the preceding section must exhibit the condition and affairs of every such corporation, person, firm, or individual, on the thirty-first day of December then next preceding, and must be published in a daily newspaper in the city where the principal office is located, for the period of one week; and must be filed with the Insurance Commissioner, as follows:

Statement  
when to be  
made.

1. If made by a person residing in, or by a company organized under the laws of this State, on or before the first day of February of each year;

2. If made by a person resident of, or by a company organized under the laws of any other State or Territory or district of the United States, on or before the first day of March of each year;

3. If made by a person resident of, or by a company organized under the laws of any country foreign to the United States, on or before the first day of April of each year.

616. The Insurance Commissioner must require, as a condition precedent to the transaction of insurance business in this State by any foreign corporation or company, that such corporation or company must file in his office the name of an agent, and his place of residence in this State, on whom summons and other process may be served in all actions or other legal proceedings against such corporation or company. All process so served gives jurisdiction over the person of such corporation or company. The agent so appointed

Agent upon  
whom pro-  
cess may be  
served







Contract  
with, to be  
made.

and designated shall be deemed in law a general agent, and must be the principal agent or chief manager of the business of such corporation or company in this State. Any act, statement, representation, or agreement, done or made by an agent so appointed and designated, which in any manner pertains to the business of such corporation or company, shall be deemed the act, statement, representation, or agreement of the principal, and shall have the same force and effect as if done or made by the principal. Any such foreign corporation or company shall, as a further condition precedent to the transaction of insurance business in this State, and in consideration of the privilege to transact such insurance business in this State, make and file with the Insurance Commissioner an agreement or stipulation, executed by the proper authorities of such corporation or company, in form and substance as follows: "The [giving name of corporation or company], does hereby stipulate and agree, that in consideration of the permission granted by the State of California to it, to transact insurance business in that State, that in all litigation between [giving name of corporation or company], and any citizen of the State of California, the Courts of said State shall have and maintain exclusive jurisdiction of such litigation. And it is further agreed that no action hereafter commenced in any District Court of said State of California against [insert name], shall be removed or transferred therefrom to the United States Circuit Court." If in any action hereafter commenced in any District Court of this State, by a citizen thereof, against a foreign corporation or company doing insurance business in said State, such corporation or company shall transfer, or cause to be transferred, such action to the United States Circuit Court, the right of such corporation or company to transact insurance business in said State shall thereupon and thereby cease and determine; and the Insurance Commissioner shall immediately revoke the certificate of such corporation or company, authorizing it to do business in said State of California.

617. The Commissioner must collect the sum of one thousand dollars from any corporation or company engaged in the business of insurance, for a failure to make and deposit, in his office, within ninety days after being thereto requested by said Commissioner, the statements and stipulations provided for in the eighth preceding section and the last preceding section; and an additional penalty of two thousand dollars for each and every month thereafter that such corporation or company continues to transact the business of insurance, until such certificate, statement, and stipulations are filed; and for that purpose suit may be instituted in the name of the people of the State of California, in any court of competent jurisdiction. The Insurance Commissioner shall immediately after the passage of this Act give due notice of its provisions to all foreign insurance corporations or companies doing or proposing to do business in this State. [Approved March 28th, 1874. In effect immediately.]

Duties of Commissioner when companies fail to make statement.

622 Whenever the laws of any State or country require of insurance companies, incorporated under the laws of this State, and having agencies in such other State or country, or of the agents thereof, any further or greater license, fees, charges, impositions, taxes, deposit of securities, statements, publications, or certificates of authority, or inflict any greater fines or penalties upon such corporations or agents than are required from similar companies or agents, belonging to such State or country respectively, then and in every such case, from every company, person, or corporation of such State or country, which has or is about to establish agencies in this State, the Commissioner must, before it continues or commences to do business in this State, collect the same license, fees, charges, impositions, and taxes, as are imposed by such State upon agents, companies, corporations, or persons of this State, doing business in such State in excess of the license, fees, charges, impositions, and taxes, upon

Retaliatory clause.





agents, companies, corporations, or persons of that State, and require the same statements, publications, certificates of authority, and the same deposit of securities as are required by the laws of such State or country, of companies, persons, or corporations, and agents of this State, doing business in such other State or country. And the same fines and penalties must be inflicted upon companies, persons, or corporations, of such other State or country, and their agents, as are inflicted by the laws of such State or country upon companies, persons, or corporations of this State, and their agents, in excess of such fines and penalties inflicted upon companies, persons, or corporations belonging to such State or country, respectively; which may be recovered by the Insurance Commissioner in the manner provided in §598 of this Code.

Conditions precedent to right to act as agent or solicitor.

**633.** No person shall, in this State, act as the agent or solicitor of any life insurance company doing business in this State, until he has produced to the Commissioner, and filed with him, a duplicate power of attorney from the company, or its authorized agent, authorizing him to act as such agent or solicitor. Upon filing such power, the Commissioner shall issue a license to him to act as such agent or solicitor for such company, if such company has received a certificate of authority from such Commissioner to do business in this State; *provided*, that if such agent or solicitor shall, within the twelve months next preceding, have been in the employ of any other company, or its authorized agent; as such agent or solicitor, he must produce to the Commissioner written evidence from such employer, that all moneys he may have collected for such company or agent have been paid over to said company or agent. Such license shall continue in force for twelve months from the date thereof, but may be and shall be sooner revoked upon application of the company or its authorized agent. Such license may be renewed from time to time, for an additional period of twelve months, on production by the holder

to the Commissioner of a certificate from the company that such person's authority as such agent or solicitor continues. For each such license, or renewal thereof, the Commissioner shall receive the sum of one dollar. The Commissioner shall keep an alphabetical list of the names of persons to whom such license shall be issued, with the date of the license and renewal, and the name of the company for which such person is working. If any person shall fraudulently assume to be an authorized agent or solicitor of any life insurance company, and thus procure, or attempt to procure, applications, or receive or attempt to obtain money for premiums, he shall be guilty of a misdemeanor. If any person shall, under a false or fictitious name, procure, or attempt to procure, a license to act as agent or solicitor of any life insurance company, he shall be guilty of a misdemeanor. [Approved March 12, 1874. Sixty days.]

Fraudulent  
assumption  
of authority  
a misde-  
meanor.

656. The Board must keep a record of all their proceedings, and any member may cause his dissent to the action of the majority upon any matter to be entered upon such record; and all claims must be entered on the minutes of the Board, before the same shall be acted upon. [Approved March 30, 1874. Immediate effect.]

Record  
claims to be  
entered on  
minutes.

672. A specific appropriation is an act by which a named sum of money has been set apart in the Treasury, and devoted to the payment of a particular demand. *Stratton v. Green*, 45 Cal. 149. The fund upon which a warrant must be drawn must be one the amount of which is designated by law, and therefore capable of definitive exhaustion. *Id.* The authority and duty of the Controller of State to draw a warrant upon the Treasurer, is limited to cases in which he is authorized to draw such warrant by some law which provides a specific appropriation for the payment of the warrant so drawn. *Stratton v. Green*, 45 Cal. 149.

737. The annual salaries of the Judges of the Third, Fourth, Sixth, Twelfth, Fifteenth, and Nineteenth Judicial Districts are six thousand dollars each.

Salary of  
District  
Judges.

777. The reports must be published in well bound volumes, and must be printed on good book paper, in

Style of  
reports.  
Copyright.







long primer leaded, except the title page, the table of cases, the synopsis, and index. The Reporter must copyright each volume of the reports in his own name—but such copyright shall be the property of the State.

Style of Reports.

**777.** The Reports must be published in well bound volumes, and must be printed on good book paper, in small pica, leaded, and brevier, equal in quality of paper and binding to Volumes Thirty-three to Thirty-nine, inclusive, of California Reports.

To be published by contract.

**778.** The Reporter shall have no pecuniary interest in the volumes of Reports, but they must be published under the supervision of the Court and Reporter, by contract, to be entered into by the Reporter, Secretary of State, and Attorney General, with the person or persons who shall agree to publish and sell the said Reports, for a period of ten years, on the terms most advantageous to the State and the public, and at a rate not to exceed four dollars per volume of seven hundred pages.

Advertising for proposals.

**779.** Before entering into said contract, it shall be the duty of the Secretary of State to advertise for proposals for the publication of said Reports, for thirty days, in one daily paper in Sacramento, and one daily paper in San Francisco. It shall be the duty of said Reporter, Secretary of State, and Attorney General, to consider all proposals for the publication of said Reports which may be made to them, and to award the contract to the person or persons who may agree to publish and sell the same on the terms most advantageous to the State and public.

Contract, what to require.

**780.** The contract must require the publisher to print and publish each volume in the style required by section seven hundred and seventy-seven, within sixty days from the time at which the manuscript is delivered by the Reporter, to sell three hundred copies to the State at the price fixed in the contract, and to keep on hand and for sale, at the price stipulated in the con-

tract, a sufficient number of copies of each volume to supply all demands for six years from the publication thereof, and to give bonds for the fulfillment of the terms of the contract, in the sum of ten thousand dollars.

781. The Secretary of State must keep on sale, at three dollars per volume, the copies of the edition not distributed under the provisions of section four hundred and ten, and must, at the end of each month, pay into the State Treasury, the proceeds of all sales made by him.

Disposition  
of edition.

781. On the publication of each volume of Reports, the Secretary of State must purchase, for the use of the State, three hundred copies of said volume at the price named in the contract, not exceeding four dollars per volume, and after having distributed the same, as required by section four hundred and ten, shall deposit the surplus copies, if any there be, in the State Library.

Secretary of  
State to  
purchase  
volumes for  
use of State.

782. If, after advertising as required by section seven hundred and seventy-nine, no proposals are received by the Secretary of State agreeing to print, publish, and sell said volumes at a price not exceeding four dollars per volume, then the State Printer must print and bind twelve hundred copies of each volume, and deliver to the Secretary of State all the copies printed by him; and the Secretary of State must keep the copies of the edition not distributed under the provisions of section four hundred and ten on sale at four dollars per volume, at retail, and at such wholesale price as may be fixed by the Governor, Controller, and Secretary of State, and must, at the end of each month, pay into the State Treasury the proceeds of all sales made by him. This act shall not apply to any volume of Reports, the printing of which may have been commenced by the State Printer at the time the contract herein provided for is made. [Approved March 24, 1874. Immediate effect.]

Duty of  
Secretary  
of State,  
when the  
proposals  
are received





Number of  
notaries.

**791.** The Governor must appoint and commission Notaries Public as follows :

For the County of San Francisco, twenty-two ;

For the Counties of Alameda, Sacramento, San Joaquin, Santa Clara, Amador, Butte, Calaveras, Contra Costa, El Dorado, Los Angeles, Monterey, Nevada, Placer, Santa Cruz, Solano, Sonoma, Tuolumne, Yolo, and Yuba, twenty each ; for each of the other Counties, fifteen.

*AN ACT to provide for the appointment of additional Notaries Public in the counties of Fresno, Tulare, and Humboldt.* [Approved January 9, 1874.]

(Enacting Clause.)

**SECTION 1.** The Governor shall have the power and is hereby authorized to appoint and commission four Notaries Public in each of the counties of Fresno, Tulare and Humboldt, in addition to the number now authorized by law to be appointed in said counties, who shall hold their offices for the period of two years and until their successors shall have been appointed and qualified.

**SEC. 2.** This Act shall take effect immediately.

*AN ACT to provide for the appointment of additional Notaries Public in some of the counties of this State.* [Approved January 19, 1874.]

(Enacting Clause.)

**SECTION 1.** The Governor is hereby authorized to appoint and commission Notaries Public in the following counties, in addition to those now authorized by law. in the county of Santa Clara eight, one of whom shall have his place of business at Mayfield, one at San Felipe, one at Milpitas, one at Saratoga, and one at Gilroy township, and one at Mountain View. In the county of Napa, one to reside at Yountville. In the counties of Santa Barbara and San Luis Obispo, three each ; in the county of Sonoma two, one to reside at Pine Flat.

**SEC. 2.** This Act shall take effect immediately.

*AN ACT to add five additional Notaries Public in Stanislaus County.* [Approved February 17, 1874.]

(Enacting Clause.)

**SECTION 1.** That in addition to the Notaries Public now provided for by law, the Governor shall appoint five additional Notaries Public for the county of Stanislaus.

**SEC. 2.** This Act shall take effect from and after its passage.

*AN ACT to provide for the appointment of an additional Notary Public for the City and County of San Francisco, for the accommodation of the inhabitants of said city and county residing south of Market street.*

[Approved February 20, 1874.]

(Enacting Clause.)

SECTION 1. The Governor is authorized to appoint and commission one additional Notary Public for the city and county of San Francisco, who, when duly qualified under and according to the laws of the State governing Notaries Public, shall be invested with all the official powers and qualifications, and subject to all the duties and liabilities of other Notaries Public lawfully appointed, commissioned and qualified for said city and county.

SEC. 2. Said Notary Public shall keep an office for the transaction of business in that portion of the city and county of San Francisco, south of Market street.

SEC. 3. This Act shall take effect and be in force from and after its passage.

*AN ACT to provide for the Appointment of an additional Notary Public for the County of Los Angeles.* [Approved March 10, 1874.]

(Enacting Clause.)

SECTION 1. For the County of Los Angeles, an additional Notary Public shall be appointed by the Governor, to reside at Anaheim, who shall hold office for the term of two years, and until his successor is appointed and qualified.

SEC. 2. Effect immediately.

*AN ACT to provide additional Notaries Public in the County of Inyo.*  
[Approved March 24, 1874.]

(Enacting Clause.)

SECTION 1. The Governor is hereby authorized to appoint two additional Notaries Public in and for the County of Inyo; and said Notaries, when appointed, shall hold office under and by virtue of all the laws now or hereafter pertaining to said officers.

SEC. 2. This Act shall take effect from and after its passage.

*AN ACT to amend an Act entitled "An Act to amend sections 3009 and 3010 of the Political Code."* [Approved March 23 (30), 1874.]

(Enacting Clause.)

SECTION 1. The Board of Health of the city and county of San Francisco shall alone have the power to appoint one City Physician, who shall receive an annual salary of nine hundred dollars, which must be paid, in equal monthly instalments, out of the general fund of the city and county of San Francisco, in the same manner as the salaries of the other officers of said city and county are paid.

SEC. 2. The said Board of Health of the city and county of San Francisco may, in their discretion, appoint one engineer and plumber, one first cook, second cook, one third cook, one baker, one butcher, one clerk and interpreter, one ambulance driver, one gatekeeper, one dresser







and sixteen nurses, as employees and medical attendants of the City and County Hospital of San Francisco.

SEC. 3. The following monthly salaries are hereby allowed to said employees and medical attendants mentioned in section 2 of this Act: Engineer and plumber, \$100 per month; first cook, \$70 per month; second cook, \$40 per month; third cook, \$35 per month; baker, \$75 per month; butcher, \$40 per month; clerk and interpreter, \$40 per month; ambulance driver, \$40 per month; dresser, \$50 per month; nurses, \$40 per month each. All of said sums must be paid monthly out of the Hospital and Almshouse Fund of said city and county of San Francisco, and the Auditor of said city and county is hereby directed to audit the said demands payable out of the fund aforesaid, upon the approval of the same by the said Board of Health.

SEC. 4. This Act shall take effect and be in force from and after its passage.

Protest,  
prima facie  
evidence of  
facts stated.

795. The protest of a Notary, under his hand and official seal, of a bill of exchange, or promissory note, for non-acceptance, or non-payment, stating the presentment for acceptance or payment, and the non-acceptance or non-payment thereof, the service of notice on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to such bill of exchange or promissory note and of the party to whom the same was given, and the Post Office nearest thereto, is prima facie evidence of the facts contained therein.

Fees.

798. The fees of Notaries are as follows: For drawing and copying every protest for the non payment of a promissory note, or for the non-payment or non-acceptance of a bill of exchange, draft, or check, two dollars; for drawing and serving every notice of non-payment of a promissory note, or of the non-payment or non-acceptance of a bill of exchange, order, draft, or check, one dollar; for recording every protest, one dollar; for drawing an affidavit, deposition, or other paper, for which provision is not herein made, for each folio, thirty cents; for taking an acknowledgment, or proof of a deed, or other instrument, to include the seal and the writing of the certificate, for the first two signatures one dollar each, and for each additional

signature, fifty cents ; for administering an oath or affirmation, fifty cents ; for every certificate, to include writing the same and the seal, one dollar. [Approved March 16, 1874. Immediate effect.]

843. No County officer must be appointed or act as the deputy of another officer of the same county.

County officer not to act as deputy of another officer.

878. The Legislature can abolish or change an office created by it, and it may extend or abridge the terms of its incumbents at pleasure. In re Bulger, In re Merrill, 45 Cal. 553.

926. Every officer charged with the disbursement of public moneys, who is informed by affidavit that any officer whose account is about to be settled, audited, or paid by him, has violated any of the provisions of this Article, must suspend such settlement or payment, and cause such officer to be prosecuted for such violation, by the District Attorney of the county. In case there be judgment for the defendant upon such prosecution, the respective officer may proceed to settle, audit, or pay such account as if no such affidavit had been filed.

When settlements must be withheld.

955. The officer whose duty it is to approve official bonds required of State, county, or township officers, must not accept or approve any such bond, unless each of the sureties severally justify before an officer authorized to administer oaths, as follows: First—On a bond given by a State officer, that such surety is a resident and freeholder or householder within this State, and on a bond given by a county or township officer, that such surety is a resident and freeholder or householder within such county, or within an adjoining county. Second—That such surety is worth the amount for which he becomes surety, over and above all his debts and liabilities, in unincumbered property, situated within this State, exclusive of property exempt from execution and forced sale. Third—A member of the Board of Supervisors shall not be accepted as surety upon the official bond of any county or township officer of his county ; nor shall the Sheriff, Clerk, Tax Collector, Treasurer,

Justification of sureties.





Recorder, Auditor, Assessor, or District Attorney of the same county become sureties upon official bonds for each other. [Approved March 30, 1874. Sixty days.]

967. Liability of Sureties on official bond of Treasurer. Placer County v. Dickerson, 45 Cal. 12.

Official  
bond of  
County  
Clerk,  
where  
filed.

986. The official bond of the County Clerk shall, after being recorded, be filed in the office of the County Treasurer, and the safekeeping of the same is hereby made the duty of the County Treasurer. [Approved March 27, 1874.]

Records  
open to  
public in-  
spection,  
except in  
divorce.

1032. The public records and other matters in the office of any officer, are at all times, during office hours, open to the inspection of any citizen of this State. In all actions for divorce, the pleadings, and the testimony taken and filed in said actions, shall not be by the Clerk with whom the same is filed, or the referee before whom the testimony is taken, made public, nor shall the same be allowed to be inspected by any person except the parties that may be interested, or the attorneys to the action, or by an order of the Court in which the action is pending; a copy of said order must be filed with the Clerk. In cases of attachment, the Clerk of the Court with whom the complaint is filed shall not make public the fact of the filing of such complaint, or of the issuing of such attachment, until after the filing of return of service of attachment.

Rules gov-  
erning  
entry.

1097. No person's name must be entered by the Clerk, unless:

1. Upon a certificate of registration in another county, showing that such registration has been cancelled, and upon proof, by the affidavit of the party, that he is an elector of the county in which he seeks to be registered;

2. Upon the returns of the Assessor of the county;

3. If a naturalized citizen, upon the production of his certificate of naturalization, or upon his own affida-

vit that it is lost, or out of his possession, which affidavit must state the place of his nativity, and the time and place of his naturalization, together with his affidavit that he has resided in the United States for five years, and in this State for six months next preceding the time of application, and that he is an elector of the county;

4. If born in a foreign country, upon his affidavit that he became a citizen of the United States by virtue of the naturalization of his father, whilst he was residing in the United States, and under the age of twenty-one years, and that he is an elector of the county;

5. Upon the production and filing of a certified copy of the judgment of a District Court directing such entry to be made;

6. In other cases, upon the affidavit of the party that he is an elector of the county;

7. In every case, the affidavit of the party must show all the facts required to be stated in the entry on the register, except the date and number of the entry.

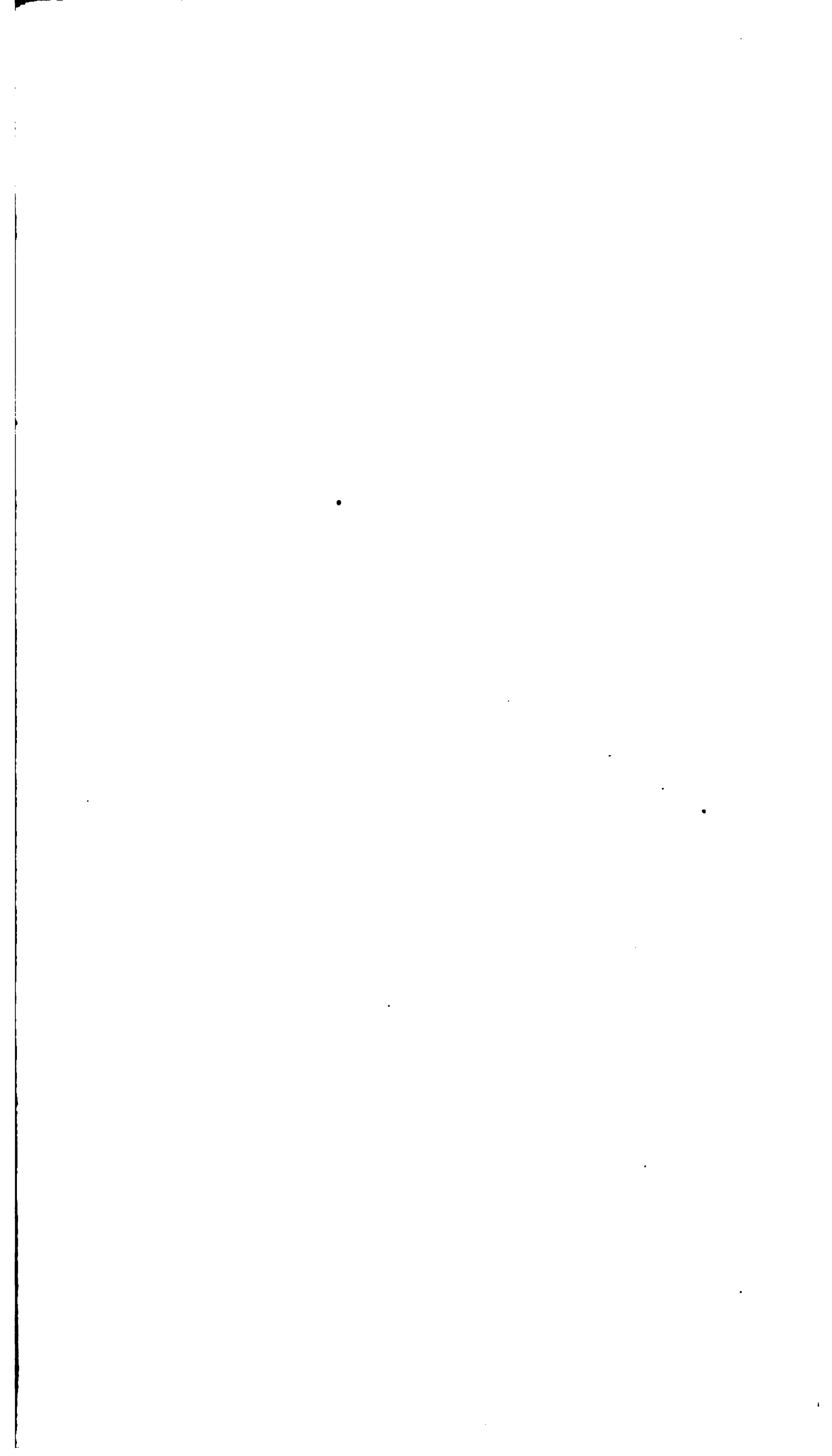
1106. The clerk must cancel the entry in the following cases:

When entry  
must be  
canceled.

1. At the request of the party registered;
2. When he knows of the death or of the removal of the person registered;
3. When the insanity of the person registered is legally established;
4. Upon the production of a certified copy of a judgment of felony, in full force against the person registered, or upon information of such conviction, obtained as hereinafter provided;
5. Upon the production of a certified copy of a judgment directing the cancellation to be made;
6. Upon the certificate of the Board of Election of any precinct sent up with the election returns, stating the death or removal, within their own knowledge, of person registered;
7. When it appears, by the returns made by the







Board and Clerks of Election, that the respective party did not vote during the next preceding three years at any general or judicial election;

8. The Clerk shall cancel upon the Great Register every name found thereon which is also found upon the Register of Deaths, provided for in section three thousand and seventy-nine of this Code;

9. Every Judge before whom proceedings were had, which result in any male person being declared incapable of taking care of himself and managing his property, and for whom a guardian of his person and estate is accordingly appointed, or which result in such person being committed to a State Insane Asylum, as an insane person, shall file with the County Clerk a certificate of that fact, and thereupon the Clerk shall cancel the name of such person upon the Great Register, if found thereon;

10. The County Clerk shall, also, in the first week of July in each year, examine the records of the Courts having jurisdiction in cases of felony, within his county, and cancel upon the Great Register the names of all persons appearing thereon who shall have been convicted of felony in any of such Courts, and which conviction shall have been carried into effect.

Any person may proceed by action to have registration canceled.

1109. Any person may proceed, by action in the District Court to compel the clerk to cancel any entry made on the Great Register illegally, or that ought to be canceled by reason of facts that have occurred subsequent to the time of such entry; but if the person whose name is sought to be canceled be not a party to the action, the Court may order him to be made a party defendant.

Clerk to make copy of Great Register.

1113. Before the fifth day of August, in each year in which there shall be a general or Presidential election, each County Clerk must make a copy of the uncanceled entries existing on the Great Register on the preceding first day of August. In lieu of such copy, for the City and County of San Francisco, the County Clerk must, from the poll list of the general and judicial

elections, held in September and October, eighteen hundred and seventy-three, and from similar poll lists of the general and judicial elections held in every second year thereafter, make out Ward Registers, one for each ward in said city and county, and upon each such Ward Register he must enter the names of the qualified electors of the ward appearing on the last general and judicial poll lists of the ward, alphabetically arranged, together with the entries respectively appearing on the Great Register opposite such names. He shall not enter the name of the same person on more than one Ward Register. He must, however, enter upon the proper Ward Register, the name of any person, who, being duly sworn, shall make satisfactory proof that he is an elector of such ward, and that his name is uncanceled on the Great Register of said city and county. He must, upon satisfactory proof, obtained in like manner, transfer any name from one Ward Register to another, at the same canceling the name on the Ward Register from which the transfer is made, noting such transfer on each such Ward Register, opposite the name. For the purposes of registration and preparation of Ward Registers, and copies thereof, required by law, the County Clerk must employ such assistants, and for such times and at such compensation as shall from time to time be authorized by the Board of Supervisors. All fees received for registration and transfers must be paid into the treasury of the city and county, and out of such treasury must be paid the compensation of such assistants, and all the necessary expenses of registration, preparation of registers, and of transfers, upon the proper orders of the Board of Supervisors. The Board of Supervisors of any county may, by order, provide for the preparation, printing, and distribution of township registers for each township, instead of copies of the Great Register, in the same manner as is herein above provided respecting Ward Registers in the city and county of San Francisco. When so ordered, the provisions of law applicable to the city and county of





San Francisco, in respect to the preparation, correction, issue, distribution, posting, use, and return of Ward Registers, shall apply to such county, the word "township" being substituted for "Ward" for that purpose, wherever it occurs; except, that the number of additional copies to be printed of such registers shall not exceed fifty for each one thousand votes cast in the respective townships at the next preceding election. The Board of Supervisors shall fix the compensation of the County Clerk for his services in preparing the township registers, which shall be paid out of the county treasury. Such order may be repealed and re-enacted as often as the Board of Supervisors may deem it expedient to do so.

Names must be arranged alphabetically and numbered.

1114. In such copy and registers the names must be arranged alphabetically, according to surnames, and must be numbered consecutively, from the first to the last name, inclusive.

Great Register must be printed.

1115. Within fifteen days after making such lists, the clerk must have printed a sufficient number of copies thereof, to supply each election precinct in the county with not less than ten copies thereof, and fifty additional for every one thousand votes cast in the county at the next preceding general election; except that in the city and county of San Francisco, the County Clerk must have printed a sufficient number of copies of each Ward Register, to supply two hundred and fifty copies thereof for the first one thousand votes, or fraction thereof, cast in the ward at the next preceding general election, and fifty additional copies for each additional one thousand votes, or fraction thereof above five hundred.

Printed copies, how distributed.

1116. The clerk must, as soon as such copies of the Great Register, or Ward, or Township Registers, are printed:

First. Post one copy in some public place in the Court House;

Second. Deliver, upon demand, one copy to each county and township officer in the county;

Third. Transmit, and cause to be delivered, not less than ten copies to each Board of Election in the county; but in cases where Ward Registers are printed, ten copies shall be delivered to each Board of Election in the respective wards, and one copy of all the registers to each Board of Election in the county;

Fourth. Preserve five copies in the office for the inspection of the public;

Fifth. Transmit to the State Library, Mercantile Library, Mechanics' Institute and Odd Fellows' Library of San Francisco, one copy each;

Sixth. Deliver one copy to each elector of the county, or respective ward, applying therefor, until the remainder of the edition printed is exhausted.

1117. A certified copy of an uncanceled entry upon the Great Register, is *prima facie* evidence that the person named in the entry, is an elector of the county.

Certified copy, *prima facie* evidence.

1131. The Board must, at least fifteen days prior to an election, issue its order appointing Boards of Election, designating the house or place within the precinct where the election must be held, and the offices to be filled, naming and numbering, in numerical order, commencing with number one, the offices to be filled, unexpired terms being lastly designated.

Board to designate place for holding election, and offices to be filled.

1132. If the Board fail to designate the house or place for holding the election, or if it cannot be held at the house or place designated, the Justices of the Peace residing in the precinct, must meet two days before the election, and by an order, under their hand (copies of which they must at once post in three public places in the precinct), designate the house or place. In the city and county of San Francisco, any three of the Justices of the Peace may discharge the duties imposed by this section, at least eighteen hours prior to the opening of the polls.

Same.







Boards of  
election,  
how ap-  
pointed.

**1142.** When an election is ordered, the Board of Supervisors must appoint, for each precinct, from the electors thereof, one Inspector and two Judges, who constitute a Board of Election for such precinct; and in the city and county of San Francisco the Board of Supervisors must also, prior to the election day, appoint for each precinct, from the electors thereof, an additional Inspector and two additional Judges, who, with the original Inspector and Judges, shall canvass the votes for such precinct, and who must be present at the closing of the polls, otherwise the Board of Election must appoint the additional Inspector and Judges, or supply the place of an absent member thereof. The original and additional Inspectors and Judges shall thenceforth constitute the Board of Election, the members relieving each other in the duties of canvassing the ballots, which may be conducted by at least half of the whole number; but the final certificates shall be signed by a majority of the whole.

Same.

**1144.** If the Board of Supervisors fail to appoint the Board of Election, or the members appointed do not attend at the opening of the polls on the morning of the election, the electors of the precinct present at that hour may appoint the Board, or supply the place of an absent member thereof.

Board to  
post copies  
of Great  
Register.

**1149.** Before opening the polls the Board must post, in some separate convenient places, easy of access, not less than four printed copies of the Great Register of the county, as last printed, except in the city and county of San Francisco, wherein not less than four printed copies of the Register of the Ward shall be so posted.

Time of  
opening and  
closing  
polls.

**1160.** The polls must be opened at one hour after sunrise on the morning of the election, and must be kept open until sunset, when the same must be closed.

**1161** of said Code is repealed.

1174. The following is the form of poll lists and tally lists to be kept by Boards and Clerks of Election :

POLL LISTS

Of the election held in the Precinct of —, in the County of —, on the — day of —, in the year A. D. one thousand eight hundred and —. A. B., C. D., and E. F., Judges, and G. H. and J. K., Clerks of said election, were respectively sworn (or affirmed), as the law directs, previous to their entering on the duties of their respective offices.

Form of  
poll list.

NUMBER AND NAME OF ELECTORS VOTING.

No.	Name.	No.	Name.
1	A. B.	3	E. F.
2	C. D.	4	G. H.

We hereby certify that the number of electors voting at this election amounts to —.

Attest:

G. H.,  
J. K.,  
Clerks.

A. B.,  
C. D.,  
E. F.,  
Board of Election.

TALLY LISTS.

Names of persons voted for, and for what office, containing the number of votes given for each candidate:

Governor.	Representative in Congress.	Members of the Legislature.	
		Senate.	Assembly.

We hereby certify that A. B. had — votes for Governor, and C. D. had — votes for Governor ; that E. F. had — votes for Representative in Congress, etc.

G. H.,  
J. K.,  
Clerks.

A. B.,  
C. D.,  
E. F.,  
Board of Election.





Form of  
ballot.

**1191.** No ticket must be used at any election, or circulated on the day of election, unless:

1. It is written or printed on paper furnished by the Secretary of State, or upon paper in every respect precisely like such paper;

2. It is five inches in width, or within one fourth of an inch of such width. If not more than fifty offices are designated to be filled, it is twelve inches in length, or within one half of an inch of such length. If more than fifty offices, and not more than eighty offices, are designated to be filled, it is eighteen inches in length, or within one half of an inch of such length. If more than eighty offices are designated to be filled, it is twenty-four inches in length, or within one half of an inch of such length;

3. If printed, the names of the persons voted for, and the offices designated, are printed in black ink, and in long primer capitals—the names of the offices in small capitals, and of the persons in large capitals—and both without spaces, except between the different words or initials in each line, and between the numbers and initials;

4. If printed, the same margin is left above the printed matter as below it;

5. If printed, the lines are straight, and the matter double leaded with six to pica leads. The word "For" comprises the top line, the margins both sides of it being equal in size. The line after the top one commences with the figure 1, then follows immediately on the same line the name of the first office designated by the Board of Supervisors in its order, issued under §1131, and lastly, on the same line, the name of the person voted for. Each subsequent line commences with the figure next in numerical order, and such number is in like manner immediately followed by the name of the office designated, and the person voted for; so that the offices shall appear upon the ticket in the order designated by the Board of Supervisors, and be numbered in numerical order, commencing with the num-

ber one. The numbers are in a straight line from top to bottom, and are within one quarter of an inch of the left hand edge of the ticket; so that the blank space for substituted names shall be on the right hand side of the ticket. The ticket shall be substantially in the following form:

FOR

1. STATE SENATOR, FRANK COWPER.
2. STATE SENATOR, PHILIP ROSS.
3. MEMBER OF ASSEMBLY, A. S. WARDEN.
4. MEMBER OF ASSEMBLY, WASHINGTON SWIFT.
5. MEMBER OF ASSEMBLY, CALEB T. HOLLIDAY.

1197. No ballot or ticket must be used or circulated on the day of any election, having any mark or thing thereon by or from which it can be ascertained what persons, or what class of persons, used or voted it, or at what time in the day such ballot was voted or used. (Approved March 26th, 1874. In effect July 6th, 1874.)

Ballots to have no marks by which it can be told who voted it.

1198. Every ticket, when used as a ballot, must be folded crosswise from the center, and as follows: if twelve inches long, four times; if eighteen inches long, five times; and if twenty-four inches long, five times, and must be pressed flat.

Tickets. how to be folded.

1227. If the name be found on the copy of the Great Register, or Ward Register, or if the party produce and file with the Board an uncanceled certificate of registration on the Great Register of the county, and the vote is not rejected upon a challenge taken, the Inspector, or Judge acting as such, must, in the presence of the Board of Election, place the ballot, without being opened or examined, in the ballot box.

Manner of voting.

1239. The Board of Election, in determining the place of residence of any person, must be governed by the following rules, as far as they are applicable:

Rules for determining question of residence.

1. That place must be considered and held to be the residence of a person in which his habitation is







fixed, and to which, whenever he is absent, he has the intention of returning;

2. A person must not be held to have gained or lost residence by reason of his presence or absence from a place while employed in the service of the United States, or of this State, nor while engaged in navigation, nor while a student at any institution of learning, nor while kept in an almshouse, asylum, or prison;

3. A person must not be held, by reason of having moved from one precinct to another, in the same county, within thirty days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election;

4. A person must not be considered to have lost his residence who leaves his home to go into another State, or precinct in this State, for temporary purposes merely, with the intention of returning;

5. A person must not be considered to have gained a residence in any precinct into which he comes for temporary purposes merely, without the intention of making such precinct his home;

6. If a person remove to another State with the intention of making it his residence, he loses his residence in this State;

7. If a person remove to another State with the intention of remaining there for an indefinite time, and as a place of present residence, he loses his residence in this State, notwithstanding he entertains an intention of returning at some future period;

8. The place where a man's family resides must be held to be his residence, but if it be a place for temporary establishment for his family, or for transient objects, it is otherwise;

9. If a man have a family fixed in one place, and he does business in another, the former must be considered his place of residence; but any man having a family, and who has taken up his abode with the intention of remaining, and whose family does not so reside

with him, must be regarded as a resident where he has so taken up his abode;

10. The mere intention to acquire a new residence, without the fact of removal, avails nothing; neither does the fact of removal, without the intention.

1253. The canvass must be commenced by taking out of the box the ballots unopened (except so far as to ascertain whether each ballot is single), and counting the same to ascertain whether the number of ballots corresponds with the number of names on the list of voters kept by the clerks. In the City and County of San Francisco, at the closing of the polls, the Inspector must administer to the additional members of the Board of Canvassers, the oath prescribed in section one thousand one hundred and forty-eight, and likewise to two clerks appointed by such additional members. He must then proceed to take out of the box the ballots, unopened, one at a time, numbering them on the backs in numerical order, commencing with number one, and writing with ink the initials of his own name upon the back of each ballot taken out. He shall pass each ballot, as soon as thus indorsed, to the additional Inspector, who must, in like manner, write thereon the initials of his own name, so that each ballot can be subsequently identified by either or both such Inspectors.

Canvass.  
how com-  
menced.

1254. If two or more separate ballots are found so folded together as to present the appearance of a single ballot they must be laid aside until the count of the ballots is completed; then, if upon a comparison of the count with the number of names of electors on the lists which have been kept by the clerks, it appears that the two ballots thus folded together were cast by one elector, they must be rejected.

Ballots  
must be  
made to  
agree with  
names on  
list.

1255 The ballots must be immediately replaced in the box and if the ballots in the box exceed in number the names on the lists, one of the Judges must publicly,

Same.





and without looking in the box, draw out therefrom singly, and destroy, unopened, a number of ballots equal to such excess; and the Board of Election must make a record, upon the poll list, of the number of ballots so drawn and destroyed. In the city and county of San Francisco the numbers appearing on the backs of the ballots so drawn, must likewise be recorded.

Certain papers to be sealed up.

**1261.** The Board must, before it adjourns, inclose in a cover and seal up and direct to the County Clerk, the copy of the Register upon which one of the Judges marked the word "Voted" as the ballots were received, all certificates of registration received by it, one of the lists of the persons challenged, one copy of the list of voters, and one of the tally lists and list attached thereto.

Inspector to keep certain papers.

**1262.** The Inspector must retain, open to the inspection of all electors, for at least six months, the other list of voters, tally list, and list attached thereto.

Must be delivered to County Clerk; packages how sealed up in San Francisco.

**1264.** The member to whom such packages are delivered, must without delay deliver such packages without their having been opened, to the County Clerk, nearest postmaster or sworn express agent, who shall indorse on such packages the name of the party delivering them, and date of such delivery. If delivered to a postmaster or express agent, such postmaster or express agent shall forward the packages by the first mail or express to the county seat. In the city and county of San Francisco, such packages must be delivered to the County Clerk within eighteen hours from the time of adjournment of the Board, which time of adjournment must be indorsed upon such package, and upon each poll list, in ink, and signed by a majority of the members of such Board. In the city and county of San Francisco the packages must be put up and sealed in the following manner, by an Inspector, and at least three others of the Board, and be signed with their

respective signatures, across the same, written: One package to contain the ballots only; one package to contain one tally list and list attached, only; one package to contain the Ward Register and certificates of registration issued by the County Clerk after making up the Ward Register, and received at the polls.

1279. Each County Clerk shall, annually, in the month of January, make a return to the office of the Secretary of State of all changes of names made in the County Court of his county under this title; such return shall show the date of the decree of the Court, original name, name decreed, and residence. Such returns shall be published in a tabular form, with the statutes first published thereafter. [Approved March 13, 1874.]

Annual return of County Clerk of change of names.

1357 Any committee or body authorized by the rules or customs of a voluntary political association or organization, to call elections of or for such association or organization, for any purpose, may, by resolution adopted at the time of making the call, elect to have such elections conducted in accordance with the rules prescribed in sections 1083, 1084, 1144, 1145, 1146, 1147, 148, 1162, 1163, 1164, 1174, 1175, 1192, 1193, 1194, 195, 1196, 1199, 1200, 1201, 1202, 1203, 1224, 1227, 129, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 138, 1239, 1240, 1241, 1242, 1252, 1253, 1254, 1255, 156, 1257, 1258, 1259, and 1260.

Committee may, by resolution, elect to hold under election laws.

This act shall take effect on the first Monday in July, eighte hundred and seventy-four. [Approved March 26, 1874]

1386. There must be maintained in the University:

1. A College of Letters;
2. A College or Colleges of Science, including Agriculture, Mechanics, Mining, Engineering, Chemistry, and such other specialties as the Board of Regents may determine;
3. College of Medicine and Law;
4. Such other Colleges as the Board of Regents may establish

Colleges to be maintained.







Course of  
instruction.

1388. Each full course of instruction consists of its appropriate studies and courses, to be determined by the Board of Regents.

Annual  
examina-  
tion for  
degrees.

1398. All students of the University who have been residents thereat for not less than one year, and all graduates thereof, may present themselves for examination in any course at the annual examinations, and, on passing such examination, may receive the degree and diploma of that course.

Endow-  
ment.

1415. The endowment of the University is:

1. The proceeds of the sale of the seventy-two sections of land granted to the State for a seminary of learning;

2. The proceeds of the ten sections of land granted to the State for public buildings;

3. The income derived from the investments of the proceeds of the sale of the lands or of the scrip therefor, or of any part thereof, granted to this State for the endowment, support, and maintenance of at least one college where the leading object shall be—without excluding other scientific and classical studies, and including military tactics—to teach such branches of learning as are related to agriculture and the mechanic arts;

4. The income of the fund set apart by “An Act for the endowment of the University of California,” approved April second, eighteen hundred and seventy, which is continued in force;

6. The State of California, in its corporate capacity, may take by grant, gift, devise, or bequest, any property for the use of the University, and hold the same, and apply the funds arising therefrom, through the Regents of the University, to the support of the University, as provided in Article Nine, section four, of the Constitution;

7. The Regents of the University, in their corporate capacity, may take, by grant, gift, devise, or bequest, any property for the use of the University, or of any

college thereof, or of any professorship, chair, or scholarship therein, or for the library, an observatory, workshops, gardens, greenhouses, apparatus, a Students' Loan Fund, or any other purpose appropriate to the University; and such property shall be taken, received, held, managed, and invested, and the proceeds thereof used, bestowed, and applied by the said Regents for the purposes, provisions, and conditions prescribed by the respective grant, gift, devise, or bequest;

8. The Regents of the University may invest any of the permanent funds of the University, which are now or hereafter may be in their custody, in productive, unincumbered real estate in this State, subject to the power of the Legislature to control or change such investments, excepting such as, by the terms of their acquisition, must be otherwise invested ;

9. If, by the terms of any grant, gift, devise, or bequest, such as are described in the preceding sixth and seventh subdivisions, conditions are imposed which are impracticable under the provisions of the Civil Code, such grant, gift, devise, or bequest, shall not thereby fail, but such conditions shall be rejected, and the intent of the donor carried out as near as may be.

1425. The University is under the control of a Board of Regents, consisting of twenty-two members; but the President of the University, for the time being, shall be a member of the Board of Regents, by virtue of his office.

University  
controlled  
by Regents.

1432. The powers and duties of the Board of Regents are as follows:

General  
powers and  
duties of  
Regents.

1. To meet at such times and places as their rules may prescribe, or at the call of the President of the Board ;

2. To control and manage the University and its property ;

3. To prescribe rules for their own government, and for the government of the University;





4. To adopt and prescribe rules for the government and discipline of the cadets;

5. To receive, in the name of the State, or of the Board of Regents, as the case may be, all property donated to the University;

6. To choose a President of the University, the Professors, and other officers and employees of the University, prescribe their duties, fix and provide for the payment of their salaries;

7. To fix the qualifications for admission to the benefits of the University;

8. To fix the admission fee and rates of tuition;

9. To appoint a Secretary and Treasurer, prescribe their duties, and fix and provide for the payment of their compensation;

10. To remove, at pleasure, any officer, professor, or employee of the University;

11. To supervise the general courses of instruction, and, on the recommendation of the several Faculties, prescribe the authorities and text books to be used in the several colleges;

12. To confer such degrees, and grant such diplomas, as are usual in Universities, or as they deem appropriate;

13. To establish and maintain a museum;

14. To establish and maintain a library;

15. To take immediate measures for the permanent improvement and planting of the University grounds;

16. To keep a record of all their proceedings;

17. Through the President of the University, to report to the Governor the progress, condition, and wants of each of the colleges embraced in the University; the course of study in each, the number of professors and students, the amount of receipts and disbursements, together with the nature, cost, and results of all important investigations and experiments, and such other information as they may deem important.

Funds may  
be drawn  
from State  
Treasurer.

**1435.** All moneys which may at any time be in the State Treasury, subject to the use of the Board of Re-

gents, may be drawn therefrom by the President of the Board, upon the order of the Board, in favor of the Treasurer of the University.

1474. The officers of cadets, between and including the ranks of Second Lieutenant and Colonel, must be selected by the chief military instructor, with the assent of the President of the University, and must be commissioned by the Governor.

Officers of  
Cadets.

1475. The Adjutant General of the State must issue such arms, munitions, accouterments, and equipments to the University Cadets as the Board of Regents may require and the Governor approve.

Equipment  
of Cadets.

1489. The powers and duties of the Board of Trustees, are as follows:

General  
powers and  
duties of  
board.

1. To prescribe rules for their own government, and for the government of the school;

2. To prescribe rules for the reports of officers and teachers of the school, and for visiting other schools and institutes;

3. To prescribe the course of study, and the time and standard of graduation;

4. To prescribe the text books, apparatus, and furniture, and provide the same, together with all stationery, for the use of the pupils;

5. To establish and maintain training or model schools, and require the pupils of the Normal School to teach and instruct classes therein;

6. To elect a Principal and other necessary teachers, fix their salaries and prescribe their duties;

7. To issue diplomas of graduation upon the recommendation of the Faculty of the school;

8. To control and expend all moneys appropriated for the support and maintenance of the school, and all moneys received for tuition, or from donations; in no event shall any moneys appropriated for the support of the school, or received from tuition or donations, be paid or used for compensation or traveling expenses of the Trustees of the school;







9. To keep a record of their proceedings;
10. To keep open to public inspection an account of receipts and expenditures;
11. To annually report to the Governor a statement of all their transactions, and of all matters pertaining to the school;
12. To transmit with such report, a copy of the principal teacher's annual report;
13. To revoke any diploma by them granted, on receiving satisfactory evidence that the holder thereof is addicted to drunkenness, is guilty of gross immorality, or is reputably dishonest in his dealings; *provided*, that such person shall have at least thirty days previous notice of such contemplated action, and shall, if he asks it, be heard in his own defense. (Approved March 30th, 1874. Effect immediately.)

**1493, 1499, 1500** of said Act are repealed. (Approved March 30th, 1874. Effect immediately.)

General  
qualifica-  
tions for  
admission  
as pupil.

**1494.** Every person admitted as a pupil of the Normal School course, must be:

1. Of good moral character;
2. Of sixteen years of age;
3. Of that class of persons who, if of a proper age, would be admitted in the public schools of this State without restriction. (Approved March 30th, 1874. Effect immediately.)

Pupils from  
other  
states.

**1496.** Persons resident of another State may be admitted upon letters of recommendation from the Governor or Superintendent of Schools thereof. (Approved March 30th, 1874. Effect immediately.)

Pupils to  
file certain  
declaration.

**1497.** Every person making application for admission as a pupil to the Normal School, must, at the time of making such application, file with the Principal of the school a declaration that he enters the school to fit himself for teaching, and that it is his intention to en-

gage in teaching in the public schools of this State, or in the State or Territory where the applicant resides. (Approved March 30th, 1874. Effect immediately.)

1503. Upon the recommendation of the Faculty of the school, the Board of Trustees may issue to those who worthily complete the full course of study and training prescribed, a diploma of graduation. To the persons receiving this diploma, the State Board of Examination shall grant a first-grade State certificate. In like manner, they shall issue to those who worthily complete the post graduate course, a professional diploma. To the persons receiving this diploma, the State Board of Examination shall grant an educational diploma; and they may, at their discretion, issue an elementary diploma to those who worthily complete such part of the course of study and training as may be prescribed. To the persons receiving this diploma, the State Board of Education shall grant a second-grade State certificate. (Approved March 30th, 1874. Effect immediately.)

Diplomas and certificates, when to issue.

1504. The Board of Trustees shall have power to appoint a Secretary, who shall receive no compensation. A full record of all the proceedings of the Board of Trustees shall be kept at the school, and shall be open to public inspection. (Approved March 30th, 1874. Effect immediately.)

Secretary of Board of Trustees.

1505. The Superintendent of Public Instruction must visit the school from time to time, inquire into its condition and management, enforce the rules and regulations made by the Board, require such reports as he deems proper from the teachers of the school, and exercise a general supervision over the same. (Approved March 30th, 1874. Effect immediately.)

Supervision by Superintendent of Public Instruction.

1507. All orders upon the Controller of State by the Board of Trustees, must be signed by the President of the Board, and countersigned by the Secretary. Upon

Orders on Controller, how drawn.





presentation of the order aforesaid, signed and countersigned as aforesaid, the Controller of State must draw his warrant on the State Treasurer in favor of the Board of Trustees for the moneys, or any part thereof, appropriated and set apart for the support of the Normal School, and the Treasurer must pay such warrant on presentation. (Approved March 30th, 1874. Effect immediately.)

General  
powers and  
duties.

**1521.** The powers and duties of the Board are as follows:

First—To adopt rules and regulations, not inconsistent with the laws of this State, for its own government, and for the government of the public schools and district school libraries.

Second—To prescribe and enforce rules for the examination of teachers.

Third—To prescribe a standard of proficiency before a County Board of Examination, which will entitle a person examined by such Board to a State certificate.

Fourth—To prescribe and enforce the course of study in the public schools.

Fifth—To prescribe and enforce the use of a uniform series of text books in the public schools, except in the city and county of San Francisco.

Sixth—To adopt a list of books for district school libraries.

Seventh—To grant or to revoke, for immoral or unprofessional conduct, profanity, intemperance, or evident unfitness for teaching, life diplomas.

Eighth—To review, on appeal, an order revoking a State certificate or diploma.

Ninth—To have done by the State Printer, or other officer having the management of the State printing, any printing required by it.

Tenth—To adopt, and use in the authentication of its acts, an official seal.

Eleventh—To keep a record of its proceedings. (Approved March 30th, 1874. Effect immediately.)

**1532.** It is the duty of the Superintendent of Public Instruction:

General  
duties of  
Superinten-  
dent.

1. To superintend the public schools in this State;
2. To report to the Governor, on or before the fifteenth day of November, of the years on which the regular session of the Legislature are held, a statement of the condition of the State Normal School and other educational institutions supported by the State, and of the public schools;
3. To accompany his report, tabular statements, showing the number of school children in the State; the number attending public schools, and the average attendance; the number attending private schools, and the number not attending schools; the amount of State School Fund apportioned, and sources from which derived; the amount raised by county and district taxes, or from other sources of revenue, for school purposes; and the amount expended for salaries of teachers, and for building school houses;
4. To apportion the State School Funds, and furnish the Controller, State Board of Examiners, and each County Treasurer and County Superintendent, with an abstract of such apportionment;
5. To draw his order on the Controller in favor of each County Treasurer, for the school moneys apportioned to the county;
6. To prepare, have printed, and furnish to all officers charged with the administration or the laws relating to public schools, and to teachers, such blank forms and books as may be necessary to the discharge of their duties;
7. To have the law relating to the public schools printed in a pamphlet form, and annex thereto forms for making reports and conducting school business, the course of study, rules and regulations, a list of text books and library books, and such suggestions on school architecture as he may deem useful;
8. To supply school officers and teachers, school







libraries, and State libraries with one copy each of the pamphlet mentioned in the preceding subdivision;

9. To visit the several orphan asylums to which State appropriations are made, and examine into the course of instruction therein;

10. To visit the schools in the different counties, and inquire into their condition; and the actual traveling expenses thus incurred, provided they do not exceed fifteen hundred dollars, shall be allowed, audited, and paid out of the General Fund, in the same manner as other claims are audited and paid;

11. To authenticate, with his official seal, all drafts, or orders drawn on him, and all papers and writings issued from his office;

12. To have bound, at an annual expense of not more than one hundred and fifty dollars, all valuable school reports, journals, and documents, in his office, or hereafter received by him, payable out of the State School Fund;

13. To deliver over, at the expiration of his term of office, on demand, to his successor, all property, books, documents, maps, records, reports, and other papers belonging to his office, or which may have been received by him for the use of his office. (Approved March 28th, 1874. Effect immediately.)

Annual  
report to  
Controller  
of number  
of children.

**1533.** The Superintendent of Public Instruction must report to the Controller, on or before the tenth day of August, of each year, the total number of children in the State between the ages of five and seventeen years, as shown by the latest reports of the School Superintendents on file in his office. (Approved March 13th, 1874. Effect immediately.)

**1542** repealed. (February 27th, 1874.)

**1756, 1845, 1846, 1847, 1848, 1542,** are hereby repealed. (Approved March 13th, 1874. Effect immediately.)

**1543.** It is the duty of the County Superintendent of each county:

General  
duties of  
School  
Superinten-  
dents.

1. To apportion the school moneys of each school district quarterly;

2. On the order of the Board of Trustees, or Board of Education, to draw his warrant upon the County Treasurer against the School Fund of any city, town, or district; he must draw his warrants in the order in which they are ordered by the proper authority; each warrant must specify the purpose for which the money is required, and must be paid in the order in which it is drawn, but no warrant must be drawn unless there is sufficient money in the fund to pay it;

3. To keep open to the inspection of the public a register of warrants, showing the fund upon which the warrants have been drawn, the number thereof, in whose favor, and for what service drawn, and also a receipt from the person to whom the warrant was delivered;

4. To visit each school in his county at least once in each year; and for every school not visited the Board of Supervisors must, on proof thereof, deduct ten dollars from the County Superintendent's salary;

5. To preside over Teachers' Institutes held in his county, and to secure the attendance thereat of lecturers competent to instruct in the art of teaching, to enforce the course of study, the use of the text books, and the rules and regulations for the examination of teachers prescribed by the proper authority;

6. To issue temporary certificates, valid until the next regular meeting of the County Board of Examination, to persons holding certificates of like grade granted in other counties;

7. To certify to the State Board of Examination the names of persons examined before County Boards of Examination;

8. To distribute all laws, reports, circulars, instructions, and blanks, which he may receive for the use of school officers;





9. To keep in his office the reports of the Superintendent of Public Instruction and a file of the educational journal;

10. To keep a record of his official acts, and of the proceedings of the County Board of Examination, including a record of the standing in each study of all applicants examined;

11. To keep in his office such works on school architecture and education as may be prescribed by the State Board of Education, and pay for them out of the unapportioned County School Fund;

12. To (except in incorporated cities and towns) pass upon, and approve, and reject plans for school houses;

13. To appoint Trustees to fill all vacancies created by failure to elect, or otherwise, to hold till the next annual election;

14. To make reports when directed by the Superintendent of Public Instruction, showing such matters relating to the public schools in his county as may be required of him;

15. In all counties containing twenty thousand inhabitants, or upwards, to devote his whole time to the supervision of the schools in his county;

16. To carefully preserve all reports of school officers and teachers, and, at the close of his official term, deliver to his successor all records, books, documents, and papers, belonging to the office, taking a receipt for the same, which shall be filed in the office of the County Clerk. (Approved March 28th, 1874. Effect immediately.)

Forfeiture  
for failure  
to report.

**1544.** If he fails to make a full and correct report, required under the provisions of subdivision fourteen of section fifteen hundred and forty-three, at the time fixed by the Superintendent of Public Instruction, he forfeits one hundred dollars of his salary, and the Board of Supervisors, upon receiving from the Superintendent

of Public Instruction notice of such failure, must deduct the amount forfeited from his salary. (Approved March 28th, 1874. Effect immediately.)

1547 of the Political Code is hereby repealed. (Approved March 28th, 1874. Effect immediately.)

1548. He must draw his warrants on the unappropriated County School Fund for the payment of members of the County Board of Examination, and in his own favor for the binding of school documents, not to exceed twenty dollars a year; for postage and expressage for his office, not to exceed one dollar for each district in his county, and for any other incidental expense as may be authorized by law. (Approved March 28th, 1874. Effect immediately.)

Warrants  
for expenses  
and claims.

1549. Each County Superintendent may appoint a deputy, but no salary payable out of the School Fund must be allowed such deputy. (Approved March 28th, 1874. Effect immediately.)

May ap-  
point  
deputy.

1551. It shall be the duty of every County Superintendent to inquire and ascertain whether the boundaries of school districts in his county are definitely and plainly described in the records of the Board of Supervisors, and to keep in his office a full and correct transcript of such boundaries. In case the boundaries of districts are conflicting or incorrectly described, he shall change, harmonize, and describe them, and make a report of such action to the Supervisors, and, on being ratified by the Supervisors, the boundaries and descriptions so made shall be the legal boundaries and descriptions of the districts of that county. For searching and transcribing such records and equalizing district boundaries, he may be allowed five dollars per day for each day's labor, to be paid out of the County School Fund. The County Superintendent, if he deem it necessary for the guidance of School Census Marshals, may order the descriptions of the district boundaries

Duty as to  
boundaries  
of school  
districts.







to be printed in pamphlet form, and pay for the same out of the County School Fund. (Approved March 28th, 1874. Effect immediately.)

School  
Superinten-  
dent to  
report  
number of  
children.

**1551.** Each School Superintendent in this State must, on or before the first day of August in each year, report to the Superintendent of Public Instruction, and to the Board of Supervisors of their respective counties, the number of children in their counties between the ages of five and seventeen years, as appears by the latest returns of the Census Marshal on file in their office. (Approved March 13th, 1874. Effect immediately.)

Compensa-  
tion and  
allowance  
for  
expenses.

**1552.** Each County Superintendent, except when otherwise provided by statute, shall receive such salary and his reasonable traveling expenses, to be estimated by the Board of Supervisors, and as may be allowed by the Board of Supervisors, which shall be paid out of the County General Fund, in the same manner as other salaried county officers are paid; *provided*, that such compensation shall not be less than a sum equal to twenty dollars for each school district in his county, exclusive of traveling expenses, and that he shall be allowed, in addition to his salary, a sum for postage and expressage, payable out of the County School Fund, equal to one dollar for each school district; *provided*, that in incorporated cities, each school containing three hundred pupils should be considered equal to one school district. (Approved March 28th, 1874. Effect immediately.)

Superinten-  
dent, when  
not to teach.

**1552** No School Superintendent who receives a salary of one thousand five hundred dollars, or more, per annum, must follow the profession of teaching, or any other avocation that can conflict with his duties as Superintendent. (Approved March 13th, 1874. Effect immediately.)

**1560.** Whenever the number of school districts in any county is twenty, or more, the County Superintendent must hold at least one Teacher's Institute in each year; and every teacher employed in a public school in the county must attend such Institute and participate in its proceedings. (Approved March 28th, 1874. Effect immediately.)

Institutes to be held annually in certain counties.

**1561.** In any county in which there are less than twenty school districts, the County Superintendent may, in his discretion, hold an Institute. (Approved March 28th, 1874. Effect immediately.)

When held in other counties.

**1564.** The County Superintendent must keep an accurate account of the actual expenses of said Institute, with vouchers for the same, and draw his warrant on the unapportioned County School Fund to pay said amount; *provided*, that such amount must not exceed one hundred dollars for any one year. (Approved March 28th, 1874. Effect immediately.)

Expenses of Institute, how paid.

**1577.** No new district can be formed unless the parents or guardian of at least fifteen census children, resident of such proposed new district present a petition to the County Superintendent, setting forth the boundaries of the new district asked for. The boundaries of any district cannot be changed, unless at least ten heads of families residing at a greater distance than ten miles from any district school house, present a petition to the County Superintendent, setting forth the change of boundaries desired, and the reasons for the same. (Approved March 28th, 1874. Effect immediately.)

Formation of new and changing boundaries of old districts.

**1578.** After giving due notice to all parties interested, by posting notices in three public places in the district, one of which shall be at the door of the school house for at least one week, the County Superintendent must transmit the petition to the Board of Supervisors, with his approval or disapproval. If he approves

Duties of Superintendent on receipt of petition for either.





the petition, he may note such changes in the boundaries as he may think desirable. (Approved March 28th, 1874. Effect immediately.)

Duties of Supervisors on same.

1579. The Board of Supervisors must, at their first meeting after the receipt of the petition, act upon the same. If the Board establishes the district, they may do so in accordance with the original prayer of the petition, or with such modifications as they choose to make. (Approved March 28th, 1874. Effect immediately.)

Election of Trustees, when and where.

1593. An election for School Trustees must be held in each district, on the last Saturday of June of each year, at the district school house, if there is one; and if there is none, at a place to be designated by the Board of Trustees.

Number and term of office.

First—The number of School Trustees for any school district except where city boards are otherwise authorized by law, shall be three;

Second—In new school districts, or in case of a vacancy for any cause in an old one, the School Trustees shall be elected to hold office for one, two, and three years respectively from the first Saturday of July next succeeding their election;

Third—Except as provided in subdivision second of this section, one Trustee shall be elected annually, to hold office for three years, or until his successor shall be elected and qualified. (Approved March 13th, 1874. Effect immediately.)

Notices of election.

1595. Not less than ten days before the election required under section fifteen hundred and ninety-three, the Trustees must post notices in three public places in the district, which notices must specify the time and place of election, and the hours during which the polls will be kept open; if within five days of the election the Trustees have failed to post the notices required under this section, then any three electors of the district may give notice of such election. (Approved March 28th, 1874. Effect immediately.)

1599. The voting must be by ballot; *provided*, that the provisions of sections eleven hundred and eighty-seven and eleven hundred and ninety-one may be dispensed with. (Approved March 28th, 1874. Effect immediately.)

Voting must be by ballot.

1600. Any person offering to vote may be challenged by any elector of the district, and the Judges of Election must thereupon administer to the person challenged an oath, in substance as follows: "You do swear that you are a citizen of the United States, that you are twenty-one years of age, that you have resided in this State six months next preceding this election, and in this school district thirty days, and that you have not before voted this day." If he takes the oath prescribed in this section, his vote must be received, otherwise his vote must be rejected. (Approved March 28th, 1874. Effect immediately.)

Challenges.

1602. The officers of election must, after counting the votes, make and deliver certificates of election to the persons elected, a copy of which, with the oath of office attached, must be forwarded to the County Superintendent. (Approved March 28th, 1874. Effect immediately.)

Certificates of election.

1611. Except when otherwise authorized by special statute, every school district shall be under the control of a Board of School Trustees, consisting of three members. (Approved March 28th, 1874. Effect immediately.)

School district to be under control of three Trustees.

1612. In school districts newly organized, or in case of vacancies for any cause in an old one, three School Trustees must be elected, to hold office for one, two and three years, respectively, from the first Saturday in July next succeeding their election. (Approved March 28th, 1874. Effect immediately.)

Trustees, election and terms of office.

1617. The powers of Boards of Trustees of school districts, and of Boards of Education in cities, are as follows:

General powers of Boards of Trustees, and of Education.







First—To prescribe and enforce rules not inconsistent with law, or those prescribed by the State Board of Education, for their own government and the government of schools;

Second—To manage and control the school property within their districts;

Third—To purchase school furniture and apparatus, and such other things as may be necessary for the use of schools;

Fourth—To rent, furnish, repair, and insure the school property of their respective districts;

Fifth—When directed by a vote of their district, to build school houses, or to purchase or sell school lots;

Sixth—To make, in the name of the district, conveyances of all property belonging to the district and sold by them;

Seventh—To employ the teachers, janitors, and employés of schools; to fix and order paid their compensation;

Eighth—To suspend or expel pupils for misconduct;

Ninth—To exclude from schools children under six years of age;

Tenth—To enforce in schools the course of study and the use of the text books prescribed and adopted by the State Board of Education;

Eleventh—To appoint District Librarians, and enforce the rules prescribed for the government of district libraries;

Twelfth—To exclude from schools and school libraries all books, publications, or papers of a sectarian, partisan, or denominational character;

Thirteenth—To furnish books for the children of parents unable to furnish them;

Fourteenth—To keep a register, open to the inspection of the public, of all children applying for and entitled to be admitted in the schools, and to notify the parent or guardian of such children when vacancies occur, and receive such children in the schools in the order to which they are registered;

Fifteenth—To make arrangements with the Trustees of any adjoining district for the attendance of such children in the school of either district as may be best accommodated therein, and to transfer the school moneys due by apportionment to such children to the district in which they may attend school;

Sixteenth—On or before the first day of June, in each year, to appoint a School Census Marshal, and notify the School Superintendent thereof;

Seventeenth—To make an annual report, on or before the first day of July, to the School Superintendent, in the manner and form and on the blanks prescribed by the Superintendent of Public Instruction;

Eighteenth—To make a report, whenever required, directly to the Superintendent of Public Instruction, of the text books used in their schools;

Nineteenth—To visit every school in their district, at least once in each term, and examine carefully into its management, condition, and wants; this clause to apply to each and every member of the Board of Trustees. (Approved March 13th, 1874. Effect immediately.)

1618 repealed.

1620. Writing and drawing paper, pens, ink, and lead and slate pencils, for the use of the schools, must be furnished under the direction of Boards of Education and Trustees, and charges therefore must be audited and paid as other claims against the School Fund of their districts audited and paid. (Approved March 28th, 1874. Effect immediately.

Stationery,  
etc., to be  
furnished  
to pupils.

1621. The Board of Trustees and Board of Education must use the school moneys received from the State or county apportionment, exclusively, for the support of schools for that school year, until at least an eight months school shall have been maintained; if at the end of any year there is an unexpended balance, it may be used for the payment of claims against the dis-

School  
moneys,  
how used





strict outstanding, or it may be used for the year succeeding. (Approved March 28th, 1874. Effect immediately.)

Liabilities  
of Boards of  
Trustees.

1623. Boards of Trustees are liable as such, in the name of the district, for any judgment against the district for salary due any teacher on contract, and for all debts contracted under the provisions of this chapter, and they must pay such judgment or liabilities out of the school moneys to the credit of such district; *provided*, that the contracts mentioned in this section are not in excess of the school moneys accruing to the district for the school year for which the contracts are made, otherwise the district shall not be held liable. (Approved March 28th, 1874. Effect immediately.)

Duty of  
Census  
Marshal.

1634. It is the duty of the Census Marshal:

1. To annually, in the month of June, take a census of all children in his district under seventeen years of age;

2. To report the result of his labors to the County Superintendent (or to the Board of Education, in cities), before the first day of July, in each year;

3. He shall visit each habitation, house, residence, domicile, or other place of abode in his district, and by actual observation and interrogation, enumerate the census children of the same. (Approved March 28th, 1874. Effect immediately.)

Same.

1635. Whenever a district is formed, lying partly in two adjoining counties, the Census Marshal must report to each County Superintendent the number of children in each county. (Approved March 28th, 1874. Effect immediately.)

Report of.

1636. His report must be made under oath, upon blanks furnished by the Superintendent of Public Instruction, and must show:

1. The number, age, sex, color, and nationality of children listed;

2. The names of the parents of such children;

3. Such other facts as the Superintendent of Public Instruction may designate. (Approved March 28th, 1874. Effect immediately.)

1638. He must not include in his report children who are attending institutions of learning, or such benevolent institutions as deaf and dumb, blind and orphan asylums, in his district, but whose parents or guardian do not reside therein. (Approved March 28th, 1874. Effect immediately.)

Children  
of non-resi-  
dents not to  
be included.

1640. If the Census Marshal neglect or refuses to make his report at the time and in the manner herein required, or to perform any other duty devolved upon him, he must be declared guilty of a misdemeanor, and on conviction, be punished by fine or imprisonment. (Approved March 13th, 1874. Effect immediately.)

Neglect or  
refusal of  
Census  
Marshal to  
report a  
misdemeanor.

1663. All schools, unless otherwise provided by special statute, must be divided in first, second, and third grade. Each County Superintendent must, under instructions from the State Board of Education, determine the respective grade or class of schools in his county. (Approved March 28th, 1874. Effect immediately.)

Schools to  
be graded.

1665. Instruction must be given in the following branches in the several grades in which each may be required, viz: Reading, writing, orthography, arithmetic, geography, grammar, history of the United States, physiology, natural philosophy, natural history, elements of form, vocal music and industrial drawing. (Approved March 28th, 1874. Effect immediately.)

Instruction,  
branches in.

1669. The education of children of African descent, and Indian children, must be provided for in separate schools; *provided*, that if the Directors or Trustees fail to provide such separate schools, then such children must be admitted into the schools for white children. (Approved March 28th, 1874. Effect immediately.)

Schools for  
Negro and  
Indian  
children.







Defacing  
school  
property,  
liability  
for.

**1686.** Any pupil who cuts, defaces, or otherwise injures any school house, fences, or outbuildings thereof, is liable to suspension or expulsion, and, on the complaint of the teacher or trustees, the parents or guardians of such pupils shall be liable for all damages. (Approved March 28th, 1874. Effect immediately.)

General  
duties of  
teachers.

**1696.** Every teacher in the public schools must:

1. Before assuming charge of a school, file his certificate with the County Superintendent;

2. On taking charge of a school, or on closing a term of school, immediately notify the County Superintendent of such fact;

3. Enforce the course of study, the use of text books, and the rules and regulations prescribed for schools;

4. Hold pupils to strict account for disorderly conduct on the way to and from school, on the play-grounds, or during recess; suspend for good cause any pupil in the school, and report such suspension to the Board of Trustees or Education for review. If such action is not sustained by them, the teacher may appeal to the County Superintendent, whose decision shall be final;

5. Keep a State school register;

6. Make an annual report to the County Superintendent at the time, and in the manner, and on the blanks prescribed by the Superintendent of Public Instruction. Any school teacher who shall end any school term before the close of the school year, shall make a report to the County Superintendent immediately after the close of such term; and any teacher who may be teaching any school at the end of the school year, shall, in his or her annual report, include all statistics for the entire school year, notwithstanding any previous report for a part of the year;

7. Make such other reports as may be required by the Superintendent of Public Instruction, County Superintendent, or Board of Trustees or Education. (Approved March 28th, 1874. Effect immediately.)

**1700.** No warrant must be drawn in favor of any teacher, unless the officer whose duty it is to draw such warrant is satisfied that the teacher has faithfully performed all the duties prescribed in section sixteen hundred and ninety-six. (Approved March 28th, 1874. Effect immediately.)

No warrant to be drawn in favor of a teacher, unless he performs his duty.

**1701.** No warrant must be drawn in favor of any teacher, unless such teacher is the holder of a proper certificate, in force for the full time for which the warrant is drawn, nor unless he was employed by the Board of Trustees or Education; *provided*, that nothing in this section shall interfere with any special school laws now in existence for the counties of Trinity, Shasta, or Inyo. (Approved March 28th, 1874, Effect immediately.)

Nor unless he hold certificate, and was employed.

*AN ACT to prevent discrimination against Female Teachers.* [Approved March 30, 1872.]

(Enacting Clause.)

**SECTION 1.** Females employed as teachers in the public schools of this State shall in all cases receive the same compensation as is allowed male teachers for like services when holding the same grade certificates.

**SEC. 2.** This Act shall take effect and be in force from and after its passage.

No discrimination as to compensation. Teachers, male and female.

**1702.** It shall be the duty of all teachers to endeavor to impress on the minds of the pupils the principles of morality, truth, justice, and patriotism; to teach them to avoid idleness, profanity, and falsehood, and to instruct them in the principles of a free government, and to train them up to a true comprehension of the rights, duties, and dignity of American citizenship. (Approved March 28th, 1874. Effect immediately.)

Duties of teachers as to instructions.

**1712.** The Boards of Trustees and of Education must expend the Library Fund, together with such moneys as may be added thereto by donation, in the purchase of school apparatus and books for a school library. (Approved March 28th, 1874. Effect immediately.)

Library Fund, how expended.





Trustees  
power and  
responsi-  
bility as to  
libraries.

**1717.** The Trustees shall be held accountable for the proper care and preservation of the library, and shall have power to assess and collect all fines, penalties, and fees of membership, and to make all needful rules and regulations not provided for by the State Board of Education, and not inconsistent therewith, and they shall report annually to the County Superintendent, all library statistics which may be required by the blanks furnished for the purpose by the Superintendent of Public Instruction. Approved March 28th, 1874. Effect immediately.)

General  
powers of  
Board of  
Examina-  
tion.

**1744.** The Board has power to grant :

1. Recommendations for life diplomas;
2. State educational diplomas, valid for six years;
3. State certificates of the first grade, valid for four years ;
4. Certificates of the second grade, valid for three years;
5. State certificates of the third grade, valid for two years, to be granted only to females;
6. To review on appeal an order revoking a county or city certificate. (Approved March 28th, 1874. Effect immediately.)

Limitation  
as to Edu-  
cational  
Diplomas.

**1746.** State educational diplomas must be issued to such persons only as have been employed in teaching for five years, and who have held a first-grade State certificate for at least a year. (Approved March 28th, 1874. Effect immediately.)

Applica-  
tions for  
life Diplo-  
mas.

**1747.** Applicants for life diplomas must file with the State Board of Education certificates of their success in teaching; and the Board, after examination, must present the application to the State Board of Education, with its recommendation. (Approved March 28th, 1874. Effect immediately.)

1748. Every applicant for a State certificate shall be examined by written and oral questions in algebra, geography, history of the United States, Constitution of the United States and California, physiology, natural philosophy, natural history, orthography, defining, penmanship, reading, method of teaching, vocal music, drawing, and School Law of California. (Approved March 28th, 1874. Effect immediately.)

Examina-  
tion of ap-  
plicants for  
Diplomas  
and Certifi-  
cates.

1749. The standing in each study must be indorsed upon the educational diploma or certificate, or otherwise it is not a valid certificate. (Approved March 28th, 1874. Effect immediately.)

Standing to  
be endorsed  
on Certifi-  
cates.

1750. Normal School diplomas, from any State Normal School in the United States, and life diplomas by the State Board of Examination or Education in any of the United States, must be recognized by this State as primary evidence of fitness for teaching; and the Board may, on application of the holders thereof, issue, without examination, State certificates, and fix the grade thereof. (Approved March 28th, 1874. Effect immediately.)

Certificates  
may be  
issued with-  
out exami-  
nation,  
when.

1751. The Board may grant State certificates to those who, in examination before County Boards, have attained the standard of proficiency prescribed by the State Board of Education; *provided*, that the original examination papers be forwarded to the State Board of Examination within fifteen days after the close of the examination. (Approved March 28th, 1874. Effect immediately.)

State Certi-  
ficates on  
examina-  
tions before  
County  
Boards.

1752. The Board may, for immoral or unprofessional conduct, profanity, intemperance, or evident unfitness for teaching, revoke any educational diploma or certificate granted by it. (Approved March 28th, 1872. Effect immediately.)

Revocation  
of Diplomas  
or Certifi-  
cates.

1753. The Board may, at the expiration of the time for which they are granted, renew diplomas or cer-

Renewal of.







tificates, except of the third grade, for a like period for which they were originally granted. (Approved March 28th, 1874. Effect immediately.)

**Meetings.** 1770. The County Board must meet and hold examinations as follows: Commencing on the first Wednesday in the months of December, March, June, and September. The place of meeting must be designated by the Chairman. (Approved March 28th, 1874. Effect immediately.)

**Certificates, to whom to be issued.** 1772. Certificates must be granted to those only who have passed a satisfactory examination in all the studies required for a State certificate of corresponding grade, and upon the questions prepared by the State Board of Examination, and reached the percentage prescribed by the State Board of Education. (Approved March 28th, 1874. Effect immediately.)

**Examinations, how to be conducted.** 1773. All examinations must be conducted partly in writing and in part orally. (Approved March 28th, 1874. Effect immediately.)

**Renewal and revocation of certificates.** 1775. The Board may, without examination, renew certificates, and may revoke any county certificate for immoral or unprofessional conduct, profanity, intemperance, or evident unfitness for teaching. (Approved March 28th, 1874. Effect immediately.)

1776 repealed.

**Compensation of Board.** 1777. Members must receive for their services a sum not exceeding three dollars per day, in addition to actual traveling expenses, for each quarterly session of the Board, payable out of the unapportioned County School Fund, on the warrant of the County Superintendent. (Approved March 28th, 1874. Effect immediately.)

**Meetings.** 1790. The Board must meet and hold examinations as follows: Commencing on the first Wednesday in the months of December, March, June, and September.

The place of meeting must be designated by the Chairman. (Approved March 28th, 1874. Effect immediately.)

1791. The Board has power to grant:

General  
powers.

1. Certificates of the same grade and for the same time as the State Board of Examination has power to grant;

2. High school certificates, valid for six years;

3. Special certificates of the first grade, valid for four years, upon such special studies as may be authorized by the State Board of Education or Board of Education in any city, or city and county;

4. High school and special certificates must be granted upon such examinations as may be authorized by the State Board of Education, or Board of Education of any city, or city and county. All other certificates must be granted upon examinations in all the studies required for a State certificate of corresponding grade, and upon questions prepared by the State Board of Examination, and upon the percentage prescribed by the State Board of Education. (Approved March 28th, 1874. Effect immediately.)

1792. The Board may, without examination, grant certificates of like grade to holders of certificates granted in other cities, and renew all certificates, except of the third grade, granted by it, and revoke any certificate for immoral or unprofessional conduct, profanity, intemperance, or evident unfitness for teaching. (Approved March 28th, 1874. Effect immediately.)

When cer-  
tificates  
may be  
granted or  
revoked

1817. The County Superintendent in each county, except in the city and county of San Francisco, must, on or before the first regular meeting of the Board of Supervisors, in September in each year, furnish the Board of Supervisors and the Auditor, respectively, an estimate in writing of the minimum amount of County School Funds needed for the ensuing year. This amount he must compute as follows:

County  
Superin-  
tendent  
to furnish  
Supervisors  
and Auditor  
annually,  
statement  
of amount  
of funds  
required.





1. He must ascertain, in the manner provided for in subdivisions one and two of section one thousand eight hundred and fifty-eight, the total number of teachers for the county;

2. He must calculate the amount required to be raised, at five hundred dollars per teacher; from this amount he must deduct the total amount of State apportionments, less ten per cent., received by the county for the next preceding school year, and the remainder shall be the minimum amount of County School Fund needed for the ensuing year; *provided*, that if this amount is less than sufficient to raise a sum equal to three dollars for each census child in the county, then the minimum amount shall be such a sum as will be equal to three dollars for each census child in the county. (Approved March 28th, 1874. Effect immediately.)

Levy of  
County Tax.

1818. The Board of Supervisors, except of the city and county of San Francisco, of each county, must, annually, at the time of levying other county taxes, levy a tax to be known as the County School Tax, the maximum rate of which must not exceed fifty cents on each one hundred dollars of taxable property in the county, nor the minimum rate be less than sufficient to raise the minimum amount reported by the County Superintendent, in accordance with the provisions of the preceding section. The Supervisors must determine the minimum rate of the county school tax as follows:

1. They must deduct fifteen per cent. from the equalized value of the last general assessment roll, and the amount required to be raised, divided by the remainder of the assessment roll, is the rate to be levied; but if any fraction of a cent occurs, it must be taken as a full cent on each hundred dollars. (Approved March 28th, 1874. Effect immediately.)

Tax, how  
levied.

1838. The trustees, upon receiving the roll, must deduct fifteen per cent. therefrom for anticipated delinquencies, and then by dividing the sum voted, to-

gether with the estimated cost of assessing and collecting added thereto, by the remainder of the roll, ascertain the rate per cent. required, and the rate so ascertained (using the full cent on each hundred dollars in place of any fraction) is hereby levied and assessed to, on or against the persons or property named or described in the roll, and is a lien on all such property until the tax is paid; and the tax, if not paid within the time limited by the next succeeding section for its payment, shall be delinquent, and must be collected in the manner prescribed in sections eighteen hundred and forty-five, eighteen hundred and forty-six, eighteen hundred and forty-seven, eighteen hundred and forty-eight, eighteen hundred and forty-nine, eighteen hundred and fifty, eighteen hundred and fifty-one, and eighteen hundred and fifty-two of this Code. (Approved March 28th, 1874. Effect immediately.)

1842. In case an Assessor or Collector of district taxes refuse or neglect to qualify within ten days after his election, or having qualified, refuses or neglects to act; or in case of any vacancy from any other cause, in either or both of said offices, the Board of Trustees shall call a special election, giving at least ten days notice, to fill the place. (Approved March 13th, 1874. Effect immediately.)

Vacancy in  
office of  
Assessor or  
Collector.

1842. In case any Assessor or Collector of district taxes refuses or neglects to qualify, within ten days after his election or appointment, or having qualified, refuses or neglects to act, or in case of any vacancy from any other cause in either or both of said offices, the Board of Trustees must call a special election, giving at least five days' notice to fill such vacancy. (Approved March 28th, 1874. Effect immediately.)

Same.

1845. When any school tax shall have become delinquent, the delinquent tax list, duly certified by the District Tax Collector of the school district in which the school tax has become delinquent, shall be delivered

Delinquent  
tax list.







to the District Attorney of the county in which the district is situated. (Approved March 28th, 1874. Effect immediately.)

Recovery of  
delinquent  
tax.

1846. It shall be the duty of the District Attorney of the county to commence a civil action, in the name of the People of the State of California, in any Court of the county, to recover the delinquent taxes. (Approved March 28th, 1874. Effect immediately.)

Form of  
complaint.

1847. In such action a complaint substantially in the following form shall be sufficient:

[Title of Court.]

The People of the State of California

vs.

(Naming the defendant.)

Plaintiff avers that the defendant is indebted to the plaintiff in the sum of \$——, district school tax for —— School District, in the County of ——, State of California, for the year 18—, and \$——, costs of collection to date.

Plaintiff demands judgment in the sum of \$——.  
(Approved March 28th, 1874. Effect immediately.)

Judgment,  
counsel  
fees.

1848. If in such action the amount is paid, or the plaintiff recover judgment, there shall be included in such judgment the sum of ten dollars as attorney's fees. (Approved March 28th, 1874. Effect immediately.)

Summons  
in action to  
enforce  
liens on real  
estate.

1849. In any action to enforce the collection of said tax, wherein any part of the tax is charged in the complaint to have been levied or assessed against, or to be a lien upon any real estate or improvements on real estate, it shall be competent to proceed *in rem* against such real estate or improvements, or against both, such real estate being described in the summons in such manner as to designate the particular tract or tracts of land sought to be charged, and in case of improvements, designating the tract of land on which the improvements are situated; and the description shall be sufficient, if it can be ascertained what land is intended,

the summons also stating the amount of taxes claimed as a lien, and the year in which the taxes were assessed. Such summons need not name any particular defendant, but may be directed to all owners, known and unknown, of the property described; and such action may, at the option of the District Attorney, also proceed against any or all persons or corporations who are under obligations to pay the tax. (Approved March 28th, 1874. Effect immediately.)

1850. Service of summons, whether issued by the District Court or a Justice's Court, may be made by publication of a copy of the summons once a week for four successive weeks, in a newspaper published in the county in which the action is commenced. The service of the summons shall be complete at the expiration of the time of such publication. (Approved March 28th, 1874. Effect immediately.)

Service of  
summons  
by publica-  
tion.

1851. Judgments rendered in such cases in the District Court shall be docketed and become liens upon all property of the defendant liable to taxation, and may be enforced against the same; and the District Attorney may file transcripts of judgments rendered in Justices' Courts, under this Article, with the County Clerk, who shall, thereupon, docket such judgments, and they shall become liens from and after such docket entry, in like manner as judgments rendered in the District Court under this Article, and the County Clerk may issue execution on such docketed Justice's judgment as on judgments rendered in the District Court. (Approved March 28th, 1874. Effect immediately.)

Judgment  
lien.

1852. The law regulating proceedings in civil cases in the Courts of Justice in this State, so far as the same is not inconsistent with the provisions of this Article, is hereby made applicable to proceedings under this Article; and any deed derived from a sale of real property, under this Act, shall be conclusive evidence of title, except as against actual frauds or prepayment of

Proceedings  
in action,  
what law to  
govern.





taxes, and shall entitle the holder thereof to a writ of assistance from the District Court to obtain possession of such property; *provided*, that the Sheriff, in selling said property, shall only sell the smallest quantity that any purchaser will take, and pay the judgment and costs; *and, provided further*, that when property is sold belonging to minors or persons under legal disability, they shall have until one year after said disability is removed, to redeem said property, by paying the whole bid and all subsequent taxes and interest. All moneys collected in this behalf, except costs and charges, shall, without delay, be paid to the Treasurer of the county, for the use of the district in which the tax was levied; and the date thereof shall be entered opposite the proper name or property in the delinquent list, which shall be open to public inspection. (Approved March 28th, 1874. Effect immediately.)

Apportion-  
ment of  
County,  
State and  
School  
fund, how  
made.

1858. All State school moneys apportioned by the Superintendent of Public Instruction must be apportioned to the several counties in proportion to the number of school census children between five and seventeen years of age as shown by the returns of the School Census Marshals for the preceding school year, provided that Indian children who are not living under the guardianship of white persons and Mongolian children shall not be included in the apportionment list. The School Superintendent of each county must apportion all State and county school moneys as follows:

First—He must ascertain the number of teachers each district is entitled to by calculating one teacher for every one hundred census children, or fraction thereof of not less than fifteen census children, as shown by the next preceding school census;

Second—He must ascertain the total number of teachers for the county by adding together the number of teachers assigned to the several districts;

Third—Five hundred dollars shall be apportioned to each district for every teacher assigned it;

Fourth—All school moneys remaining on hand after apportioning five hundred dollars to each district for every teacher assigned it must be apportioned to the several districts having not less than fifty census children in proportion to the number of census children in each of said districts. (Approved March 13th, 1874. Effect immediately.)

1858. All State school moneys apportioned by the Superintendent of Public Instruction, must be apportioned to the several counties in proportion to the number of school census children between five and seventeen years of age, as shown by the returns of the School Census Marshal of the preceding school year; *provided*, that Indian children, who are not living under the guardianship of white persons, and Mongolian children, shall not be included in the apportionment list. The School Superintendent of each county must apportion all State and county school moneys as follows:

Apportionment of State and County School fund, how made.

First—He must ascertain the number of teachers each district is entitled to, by calculating one teacher for every one hundred census children, or fraction thereof of not less than fifteen census children, as shown by the next preceding school census.

Second—He must ascertain the total number of teachers for the county, by adding together the number of teachers assigned to the several districts.

Third—Five hundred dollars shall be apportioned to each district for every teacher assigned it; *provided*, that to districts having ten and less than fifteen census children, shall be apportioned three hundred dollars.

Fourth—All school moneys remaining on hand, after apportioning five hundred dollars to each district having fifteen census children or more, for every teacher assigned it, and after apportioning three hundred dollars to districts having less than fifteen census children, must be apportioned to the several districts having not less than fifty census children, in proportion to the number of census children in each district. (Approved March 28th, 1874. Effect immediately.)







Apportionment of State and County School fund how made.

**1859.** On or after the first day of July, eighteen hundred and seventy-five, no school district is entitled to receive any apportionment of State or county school moneys, which has not maintained a public school for at least six months during the then next preceding school year; but any new district formed by the division of an old one, is entitled to its apportionment when the time that school, maintained in the old district before division, and in the new district after division, is equal to at least eight months. Any school district which neglects or refuses to adopt and use the State series of text books, and State course of studies required by law, is not a school district within the meaning of this Article. (Approved March 28th. 1874. Effect immediately.)

Insulting or abusing teacher, when a misdemeanor.

**1867.** Any parent, guardian, or other person, who shall insult or abuse any teacher in the presence of the school, shall be guilty of a misdemeanor, and be liable to a fine of not less than ten nor exceeding one hundred dollars. (Approved March 28th, 1874. Effect immediately.)

Disturbing Public School, a misdemeanor.

**1868.** Any person who shall willfully disturb any public school, or any public school meeting, shall be guilty of a misdemeanor, and liable to a fine of not less than ten nor more than one hundred dollars. (Approved March 28th, 1874. Effect immediately.)

Issuance of Certificate or Diploma otherwise than as provided, a misdemeanor.

**1869.** Any State, County or City, or City and County Superintendent, or any State, County, or City and County Board of Examinations, who shall issue a certificate or diploma, except as provided for in this Title, shall be guilty of misdemeanor. (Approved March 28th, 1874. Effect immediately.)

School Officers and Teachers prohibited from acting as agent, etc

**1870.** No officer named in this title, or teacher in any public school held under the provisions of this title, must act as agent for any author, publisher, bookseller, or other person, to introduce any book, apparatus, furniture, or any other article whatever, in the

common schools of this State, or any one or more of them, or directly or indirectly contract for or receive any gift or reward for so introducing or recommending the same; and any officer so acting or receiving must be deemed guilty of a misdemeanor, and on conviction, be punished by fine or imprisonment, and be removed from office. (Approved March 13th, 1874. Effect immediately.)

1871. Diplomas or certificates shall be issued by any State, County, City, or City and County Board of Examination, to such persons only as shall have given evidence of good moral character. (Approved March 28th, 1874. Effect immediately.)

Applicants must present evidence of good character.

1874. Any books once adopted as part of a uniform series of text books must be continued in use for not less than four years; *provided*, that if at any time after their adoption, the retail price of such books is raised above the first introduction price, some other books may be substituted for such books; *provided further*, that such substitution, or the adoption of new books in place of books which have been in use not less than four years, must be in the following manner: 1—At least six months' notice must be given of any proposed change of text-books. 2—Publishers of text-books must be invited to submit proposals for the supplying of the required text-books; said proposals must be accompanied by sample copies of the books proposed to be furnished, together with the statement of the retail price at which the books will be sold in this State, for the full time for which the books are adopted. 3—If no proposals are received, as required in the preceding subdivision, or if the books proposed to be furnished are inferior in contents, or in binding, paper, typography, or presswork, or are to be sold at a higher retail price than the books already in use, then the books already in use must be continued in use. [Approved March 28, 1874. Effect at once.]

Books once adopted must be continued four years.

New books when and how adopted.





Fines.

1935. All fines and penalties for non-attendance upon drills, parades, and inspections, legally determined and imposed under the provisions of such rules and by-laws, may be collected by action in Justice's Court, in the name of the people of the State of California; and the books and records of regiments, battalions, and companies, and the proceedings under which delinquents are fined, are *prima facie* evidence of the facts therein stated.

Exemption  
from Poll  
Tax, etc.

1936. All officers, musicians, and privates of the National Guard, who comply with all military duties, as provided in this chapter, are entitled to the following privileges and exemptions, viz: Exemption from payment of poll tax, road tax, and head tax of every description. All officers, non-commissioned officers, musicians, and privates, who have faithfully served in the military service of this State, for the space of seven consecutive years, and receive the certificate of the Adjutant General certifying the same, are thereafter exempted from further military service, except in time of war. And the Adjutant General must issue such certificate of exemption, when it appears that the party applying is entitled to the same.

Clothing  
and main-  
tenance of  
pupils.

2240. If the parents or guardian of any pupil in the Asylum for the Deaf, Dumb, and Blind, shall be unable to clothe such child, the parent or guardian may testify to such inability before the Judge of the county wherein he or she is resident, and if said Judge is satisfied that the parent or guardian is not able to provide suitable clothing for the child, he shall issue a certificate to that effect; and, upon presentation of such certificate, it shall be the duty of the Directors of said Asylum to clothe the child, the expenses to be paid out of appropriations made for the support of the Asylum. All pupils in the Asylum shall be maintained at the expense of the State. (Approved March 18th, 1874. Effect immediately.)

**2255.** The powers and duties of the Board are as follows: Powers and duties of board.

1. To make by-laws, not inconsistent with the laws of the State, for their own government, and the government of the asylum;

2. To elect the principal teacher;

3. To elect a Treasurer, who shall not be a member of the Board of Directors;

4. To elect a physician for the asylum, for the term of two years, who shall not be a member of the Board of Directors;

5. To remove, at pleasure, any teacher or employé;

6. To fix the compensation of teachers and employés;

7. To make diligent inquiry into the departments of labor and expense, the conditions of the asylum, and its prosperity;

8. To hold stated meetings at the asylum at least once in every three months;

9. To keep a record of their proceedings;

10. To report to the Governor a statement of the receipts and expenditures, the condition of the asylum, the number of pupils, and of such other matters touching the duties of the Board as they may deem advisable.

**2295.** It is the duty of the librarian:

General duties of Librarian

1. To be in attendance at the library during office hours.

2. To act as Secretary of the Board of Trustees, and keep a record of their proceedings;

3. To purchase books, maps, engravings, paintings, and furniture for the library;

4. To number and stamp all books and maps belonging to the library, and to keep a catalogue thereof;

5. To have bound all books and papers that require binding;

6. To keep a register of all books and property added to the library, and of the cost thereof:







7. To keep a register of all books taken from the library;

8. To establish and maintain a system of domestic and foreign exchange of books, and to obtain from the Secretary of State such numbers of all State publications as may be sufficient to meet the demands of the system established.

Library fund.

2300. The State library fund consists of the fees collected and paid into the State Treasury by the Secretary of State and Surveyor-General.

2522. Location of San Francisco red line. Authority of State Harbor Commissioners. *People v. Klumpke*, 41 Cal. 263.

Origin of highway.

2619. Roads laid out and recorded as highways by order of the Board of Supervisors, are highways. Whenever any corporation owning a toll bridge or a turnpike, plank, or common wagon road, is dissolved, or has expired by limitation or non-user, the bridge or road becomes a highway. (Approved March 30th, 1874. Thirty days.)

Abandonment of highway.

2620. Roads laid out as provided in section two thousand six hundred and nineteen of this act shall not be vacated or cease to be a highway until so ordered by the Board of Supervisors. (Approved March 30th, 1874. Thirty days.)

The public easement.

2631. By taking or accepting land for a highway, the public acquire only the right of way and the incidents necessary to enjoying and maintaining it, subject to the regulations in this and the Civil Code provided. (Approved March 30th, 1874. Thirty days.)

2634. Grant by City Council to lay Street railroad. *O. R. R. Co. v. O. B. & F. V. R. R. Co.*, 45 Cal. 365. Right of Street railroad on street. *Shea v. P. & B. V. R. R. Co.*, 44 Cal. 414.

2645 and 2646 of said Code are repealed. (Approved March 30th, 1874. Thirty days.)

2647. The Board of Supervisors of each county, by proper ordinance, must:

Duties of  
Board of  
Supervi-  
sors.

1. Divide the county into a suitable and convenient number of road districts, and appoint therefor annually, or whenever vacancies occur, overseers, upon petition of a majority of property taxpayers of the road district, with power to remove for cause;

2. Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided;

3. Abolish or abandon such as are unnecessary;

4. Contract, agree for, purchase, or otherwise acquire the right of way over private property for the use of public highways, and for that purpose institute, or require the District Attorney to institute, proceedings under Title VII, Part III, of the Code of Civil Procedure, and to pay therefor from the District Road Fund of the particular district;

5. Let out by contract the improvement of highways and the construction and repair of bridges, or other adjuncts to highways, when the amount of work to be done by contract exceeds three hundred dollars;

6. Levy a property road tax;

7. Order and direct overseers specially in regard to work to be done on particular roads in their districts;

8. Cause to be erected and maintained on the highways they may designate, milestones or posts, and guide-posts, properly inscribed;

9. Cause the road tax collected each year to be apportioned to the road districts entitled thereto, and kept by the Treasurer in separate Funds;

10. Audit and draw warrants on the Funds of the respective road districts, when required to pay for right of way, or work or improvements thereon;

11. Furnish to each road overseer a copy of this chapter. (Approved March 30th, 1874. Thirty days.)

2647. Duty of Commissioners appointed under special act. *Jacobus v. Oakland*, 42 Cal. 21.





Road districts, how defined and described.

**2648.** The road districts must be carefully and distinctly defined and described, and designated by the municipal towns or townships or precinct lines ; until such division is made, the road districts of the various counties must continue as they are at present defined. Road districts may be altered, changed, created, or modified by the Board of Supervisors as occasion requires, and upon petition of a majority of the land owners in any precinct or school district, they shall constitute such precinct or school district a road district. (Approved March 30th, 1874. Thirty days.)

Overseers notified to give bond, take oath, etc.

**2649.** Overseers of road districts receive notice of their appointment from the clerk of the Board of Supervisors, and within ten days thereafter must give the official bond required by the Board of Supervisors in the order of appointment or confirmation, and take the usual oath of office. The notice and certificate that the bond has been filed, and the oath taken and indorsed thereon, or a certified copy thereof, constitutes a commission, and authorizes the person named in and holding the same to discharge the duties of overseer, until superseded. (Approved March 30th, 1874. Thirty days.)

Duties of Road Overseers.

**2650.** Road Overseers, under the direction and supervision, and pursuant to orders of the Board of Supervisors appointing them, must:

1. Take charge of the public highways within their respective districts;
2. Keep them clear from obstructions and in good repair;
3. Cause banks to be graded, bridges and causeways to be made where necessary, keep the same in good repair, and renew them when destroyed;
4. Give two days notice to the inhabitants of his road district liable to do work on roads, when, where, with what implements, and under whose direction to work, and superintend the same;
5. Collect from each inhabitant notified to work,

and who fails to work or prefers to pay it, the commutation fee;

6. Make semi-annual reports of all labor performed in his district, and how all road poll-tax and commutation moneys were expended, to the Board of Supervisors, under oath;

7. Receive and present petitions for new roads, recommend or disapprove of the same, and assist in laying them out;

8. Collect all road poll-taxes in the mode provided for the collection of other poll-taxes, and faithfully account for and pay over the same;

9. Pay over to his successor, or into the fund of his road district in the County Treasury, all road moneys in his hands and unexpended;

10. Receive for his services, from money coming into his hands belonging to his road district, the sum of three dollars for each day's service performed by him, not to exceed three hundred dollars per annum, to be audited and ordered paid by the Board of Supervisors, provided that each Road Overseer in the county of Sierra shall receive four dollars per day for each day's service performed by him. (Approved March 30th, 1874. Thirty days.)

2651, 2652 are repealed. (Approved March 30th, 1874. Thirty days.)

2653. From the property road tax collected from all sources, the Board of Supervisors may annually set apart a sum not exceeding twenty per cent. of the aggregate for general county road purposes, from which they may direct such amounts to be paid as may be found necessary for such general road purposes, in which the inhabitants of all the districts are more or less interested. The object of the appropriation must be specified in each order made therefor. The Board shall have no power to create debt on any road district in excess of ten per cent. on the estimated amount of the tax receipts from said district for the next ensuing year. (Approved March 30th, 1874. Thirty days.)

General  
road fund  
for general  
road pur-  
poses.







Bonds of  
Road dis-  
trict for  
macadmiz-  
ing.

**2654.** Upon a petition signed by a majority of persons liable to pay a road tax of any kind, and also of those owning a majority of the taxable property in any road district, the Board of Supervisors, for the purpose of macadamizing the roads of such district (but for no other purpose), may issue bonds of the road district not exceeding in the aggregate five per cent. of the taxable property thereof. The bonds so issued shall bear interest at the rate of eight per cent. per annum, payable annually, and must be redeemed within five years from date of issuance. The board must also levy a tax annually, not exceeding one and one eighth of one per cent., for the payment of interest and a part of the principal of such bonds, until the entire amount of bonds issued are redeemed. The provisions of this section shall apply to any bonds heretofore issued for the purposes therein mentioned.

Who owe  
a road Poll  
Tax.

**2657.** Every male inhabitant of a road district, over twenty-one and under fifty years of age, must perform two days' labor, annually, to be known as the road poll-tax, upon the roads and highways of the district, under the demand and direction of the Road Overseer thereof, or pay to such Overseer a commutation fee of four dollars. (Approved March 30th, 1874. Thirty days.)

Overseers  
to make a  
list of in-  
habitants.

**2658.** Each Road Overseer must, within twenty days after being notified of his appointment and qualification, deliver to the clerk of the Board of Supervisors a list of the inhabitants of his district liable for the road poll-tax therein. This list must be laid before the Board of Supervisors at their first meeting held thereafter. (Approved March 30th, 1874. Thirty days.)

Levy of  
Road Poll  
Tax, when  
and how  
made.

**2659.** The Board of Supervisors must, each year, prior to the meeting at which they are required to levy the property tax for county purposes, estimate the probable amount of property tax for highway purposes which may be necessary for the ensuing year over and

above the road poll-tax, and must regulate and fix the amount of property highway-tax, and levy the same thereby. (Approved March 30th, 1874. Thirty days.)

**2660.** The Board of Supervisors must provide proper blank road poll-tax receipts, to be signed by the clerk of the Board; and must deliver to each Road Overseer a number to each equal to the number of inhabitants of their respective districts liable for road poll-tax, take receipt therefor, and charge the road office receiving the same therewith; but credit must be given to each Road Overseer for all unsold blank road poll-tax receipts returned to the clerk of the Board of Supervisors. (Approved March 30th, 1874. Thirty days.)

Road Poll  
Tax receipts

**2661.** Road Overseers must make out lists of the inhabitants of the road districts liable for road poll-tax, and require of each the performance of the labor or the payment of the commutation, and apply such labor and commutation money in the opening, maintenance, and repair of the highways and adjuncts in their respective road districts. (Approved March 30th, 1874. Thirty days.)

Tax lists  
made out,  
labor and  
commuta-  
tion, how  
applied.

**2662.** The Road Overseers must, from time to time, add to the lists the names of persons liable for road poll-tax, who were omitted, or who have become inhabitants of his district since the original list was made, and enforce the road poll-tax, or collect the commutation fee therefor, and apply the same as hereinbefore provided. (Approved March 30th, 1874. Thirty days.)

Overseers to  
add omit-  
ted and new  
inhabitants

**2664.** Bridges crossing the line between cities or towns, and road districts, must be constructed by the cities or towns and the Road Fund of the road districts into which such bridges reach, proportionally; *provided*, that the Board of Supervisors may order the whole expense of constructing or repairing said bridges out of the general Road Fund of the county. (Approved March 30th, 1874. Thirty days.)

Cities and  
Towns not  
to pay tax.





Overseers to whom and what to report.

2665. Every Overseer must make to the Board of Supervisors, semi-annually, a written account, under oath, containing:

1. The names of all persons assessed to work in his district;
2. The names of all who have actually worked, and the number of days;
3. The names of all who have commuted, and the amount received from them;
4. The names of all delinquents, and the amount collected from them;
5. A full return by items of the amount of labor and money expended at each separate point, and the manner in which, and the time when the same was done ;
6. The number of road poll-tax receipts sold, and those returned unsold;
7. An accurate account of every day he himself was employed, and the nature and items of the service rendered. (Approved March 30th, 1874. Thirty days.)

2686 of said Code is repealed. (Approved March 30th, 1874. Thirty days.)

Unexpended moneys to be paid over.

2687. Road Overseers must accompany their reports with all unexpended moneys remaining in their hands at the date of the report. (Approved March 30th, 1874. Thirty days.)

Penalty for failure to report or pay over.

2688. A failure to make a report as required, or to pay over, on the order of the Board of Supervisors, any moneys in his hands, subjects the Overseer to a penalty of twenty-five dollars, to be recovered in an action on his bond, together with any balance due from him. Suit therefor may be instituted by the District Attorney, under order of the Board of Supervisors. (Approved March 30th, 1874. Thirty days.)

Who may apply for change or for new road.

2689. Any ten inhabitants of a road district, taxable therein for road purposes, may petition in writing the

Board of Supervisors, to alter or discontinue any road, or to lay out a new road therein. (Approved March 30th, 1874. Thirty days.)

2702. Particularity and Sufficiency of Notice. *Potter v. Ames*, 43 Cal. 75.

2704. No report of Viewers must, by the Board of Supervisors, be approved which, without the consent of the owner and occupant, would have the effect to open a road:

Report of  
viewers not  
to be ap-  
proved,  
when.

1. Through an orchard of four years growth ;
2. Through a garden or yard four years cultivated ;
3. Through buildings or fixtures, or erections for the purposes of residence, trade, or manufacture ;
4. Through inclosures necessary for the use or enjoyment of the buildings, fixtures, or erections ; or,
5. Through inclosed or improved lands ; unless the Board of Supervisors are satisfied, from personal examination and observation, or from the sworn statement of at least five residents of the road district, that the opening of such road through such premises is a necessity, a great public benefit, or a great convenience to a moiety of the inhabitants of the district. (Approved March 30th, 1874. Thirty days.)

2706. The Board of Supervisors, on the coming in of the report, must fix a day for hearing the same ; must notify the owners of land not consenting to give the right of way of the hearing, by having written notice served on them personally, or on the occupant or agent of the owner ; or if neither, by posting notice at the most conspicuous place on the land, or left at the owner's, agent's, or occupant's residence ten days prior to the day fixed for the hearing ; and must, on the day fixed, or to which it may be postponed or adjourned, hear evidence and proof from all parties interested for and against the proposed alteration or new road ; ascertain, and by order declare, the amount of damage

Proceedings  
of Board, in  
hearing re-  
port







awarded to each non-consenting landowner, and declare the report of the Viewers to be approved or rejected. (Approved March 30th, 1874. Thirty days.)

Effect of  
and pro-  
ceedings on  
appeal of  
viewers re-  
port.

**2707.** If the Board approve the report, and there are no non-consenting landowners, the road must, by order, be declared a public highway, and the Road Overseer ordered to open the same to the public. If there are non-consenting landowners, the Board must appropriate from the road fund of the district, and cause the Road Overseer to tender to such non-consenting landowners the award for damages made by the Board. If the awards are all accepted, the road must be declared a public highway, and be opened as before provided. (Approved March 30th, 1874. Thirty days.)

Proceedings  
to procure  
right of  
way.

**2708.** If any award of damages is rejected by the landowners, the Board must, by order, direct proceedings to procure the right of way to be instituted by the District Attorney of the county, under and as provided in Title VII, Part III, of the Code of Civil Procedure, against all non-accepting landowners, and when thereunder the right of way is procured, the road must be declared a public highway, and opened as hereinbefore provided. But if any non-consenting landowner does not recover a greater amount of damages than shall have been allowed him by the Board of Supervisors, then he shall pay all costs and expenses incurred by reason of the suit or other proceedings instituted in the matter. (Approved March 30th, 1874. Thirty days.)

**2708.** Land is not taken for public use till money awarded as damages is set apart. *Murphy v. De Groot*, 44 Cal. 51. Right of Way for a road. *Brady v. Bronson*, 45 Cal. 640. Right of Way by license. *Barbour v. Pierce*, 42 Cal. 657.

Fence to be  
removed,  
how.

**2714.** When the alteration of an old, or the opening of a new road, makes it necessary to remove fences on land given, purchased, or condemned by order of a Court, for road or highway purposes, notice to remove the fences must be given by the Road Overseer to the

owner, his occupant, or agent, or by posting the same on the fence, and if the same is not done within ten days thereafter, or commenced and prosecuted as speedily as possible, the Road Overseer may cause it to be carefully removed at the expense of the owner, and recover of him the cost of such removal, and the fence material may be sold to satisfy the judgment. (Approved March 30th, 1874. Thirty days.)

2724. All public bridges not otherwise specially provided for, are maintained by the road district in which they are situate, the districts which they unite, and the county at large, in the same manner as highways, and under the management and control of the Road Overseer and the Board of Supervisors, the expense of constructing, maintaining, and repairing the same, being primarily payable out of the road fund of the district, in the hands of the Road Overseer or County Treasurer, and from road poll taxes. (Approved March 30th, 1874. Thirty days.)

Bridges,  
how main-  
tained and  
by whom.

2725. Whenever it appears to the Board of Supervisors that any road district is or would be unreasonably burdened by the expense of constructing or maintenance and repair of any bridge, they may, in their discretion, cause a portion of the aggregate cost or expense to be paid out of the General Road Fund of the county, or out of the General County Fund, or both, or they may levy a special bridge tax therefor, not exceeding one fourth of one per cent. on the taxable property of the county, annually, till the amount appropriated in aid is raised and paid. In the county of Tehama the amount raised for any one bridge shall not exceed the sum of ten thousand dollars for any one year, unless the proposition to raise the amount is first submitted to a vote of the people of the county in the manner and at the time and under such rules as the Board may prescribe and a majority of the votes are in favor of the proposition. (Approved March 30th, 1874. Immediate effect.)

When aid  
may be  
given by  
county for  
bridge.

Limitation  
as to  
Tehama  
County.





Construc-  
tion and  
repair of  
bridges to  
be let by  
contract.

**2726.** No bridge, the cost of the construction or repair of which will exceed the sum of three hundred dollars, must be constructed or repaired, except on order of the Board of Supervisors. When ordered to to be constructed or repaired, the contract therefor must be let out to the lowest bidder, after reasonable notice given by the Board of Supervisors, through the Road Overseer, by publication at least two weeks in a county newspaper; and if none, then by three posted notices—one at the Court House, one at the point to be bridged, and one at some other neighboring public place. The bids to be sealed, opened, and the contract awarded at the time specified in the notice. The contract and bond to perform it must be entered into to the approval of the Board of Supervisors. (Approved March 30th, 1874. Thirty days.)

Construc-  
tion of  
bridge pe-  
titioned for,  
and notice.

**2729.** When a bridge, the cost of which will exceed three hundred dollars, is necessary, any five or more freeholders of the road district interested therein may petition the Board of Supervisors for the erection of such needed bridge. The Board must thereupon advertise such application, giving the location and other facts, for two weeks, in a newspaper printed in the county; if none, then by posters—one at the proposed location, one at the Court-house, and one at some other public place in the county—and notify the Overseer to attend at a certain time and place to hear the application. (Approved March 30th, 1874. Thirty days.)

Report of  
overseers to  
embrace  
bridges.

**2731.** Road Overseers must, in their official reports, give a full account of all bridges of which they have in whole or in part the charge and maintenance, those constructed or repaired, and the cost thereof, the amounts expended thereon, from what source derived, and the present and prospective condition thereof. (Approved March 30th, 1874. Thirty days.)

**2732.** The county is responsible for providing and keeping passable and in good repair, bridges on all public highways, and the Supervisors must appoint semi-annually a special meeting, at which the Road Overseers, on days set apart for their respective districts, to hear highway and bridge reports and complaints from officers and citizens, when such orders must be made, and such action had regarding the same, as the public welfare demands. (Approved March 30th, 1874. Thirty days.)

Semi-annual meeting for highway purposes.

**2743.** If any highway, duly laid out or erected, is encroached upon by fences, buildings, or otherwise, the Road Overseer of the district may, orally or in writing, require the encroachment to be removed from the highway. (Approved March 30th, 1874. Thirty days.)

Removal of encroachments.

**2746.** If the encroachment is denied, and the owner occupant, or person controlling the matter or thing charged with being an encroachment, refuses either to remove or to permit the removal thereof, the Road Overseer must commence, in the proper Court, an action to abate the same as a nuisance; and if he recovers judgment, he may, in addition to having the same abated, recover ten dollars for every day such nuisance remained after notice, and also his costs in such action. (Approved March 30th, 1874. Thirty days.)

If encroachment denied, action for nuisance to be brought.

**2746.** A private individual cannot bring an action to abate an obstruction to a public road, without showing special damage. *Aram v. Shallenberger*, 41 Cal. 449; *L. T. & S. W. W. R. Co.*, 41 Cal. 562.

**2747.** If the encroachment is not denied, but is not removed for five days after the notice is complete, the Road Overseer may remove the same at the expense of the owner, occupant, or person controlling the same, and recover his costs and expenses, as, also, for each day the same remained after notice was complete, the sum of ten dollars, in an action for that purpose. (Approved March 30th, 1874. Thirty days.)

If encroachment not denied, how removed.







Notice on  
bridges and  
penalty for  
disregard-  
ing.

**2754.** Road Overseers may put up on bridges under their charge notices that there is "Five dollars fine for riding or driving on this bridge faster than a walk." Whoever thereafter rides or drives faster than a walk on such bridge is liable to pay five dollars for each offense. (Approved March 30th, 1874. Thirty days.)

Destroying  
shade or  
ornamental  
trees.

**2755.** Whoever digs up, cuts down, or otherwise injures or destroys, any shade or ornamental tree, unless the same may be deemed an obstruction by the Road Overseer, and removed under his direction, planted or standing on any highway, forfeits twenty-five dollars for each such tree.

Counties to  
which act  
shall apply.

This Act shall apply only to the following named counties: Calaveras, Santa Barbara, San Luis Obispo, Ventura, Fresno, Kern, Tehama, Contra Costa, Marin, Lake, Sierra, Plumas, Sacramento, Sutter, Mendocino, Mariposa, Alameda, and Lassen; *provided*, that this Act shall not be in force and effect in Solano, Los Angeles, San Joaquin, and Yuba, until the first Monday of March, 1876. (Approved March 30, 1874. Thirty days.)

Pack trails  
in mountain  
districts.

**2832.** The Boards of Supervisors of the several counties of this State are hereby authorized to permit the Toll Road Companies heretofore or which may hereafter be organized under the provisions of this Code, for the purpose of constructing toll roads within the mountain districts of this State, to first construct on the line of their proposed toll road a pack trail for the accommodation of pack trains and horsemen, and to collect tolls thereon; the Board of Supervisors shall fix the amount of license to be paid and tolls to be collected on such pack trail, and that no such permit or franchise shall be granted for a longer period than two years. (Approved March 30th, 1874. Effect immediately.)

**2950.** The report must state:

Form of report.

1. The name, place of birth, last residence, age, and occupation of all such passengers who are not citizens, or who shall have, within the last preceding twelve months, arrived from any country out of the United States, and who have not been bonded or paid commutation money, as provided in this chapter, as have been landed from any such vessel at any place during her last voyage, or who have gone on board of any vessel with the intention of coming into this State, or who may have died during the last voyage of such vessel; and,

2. Whether any of the passengers so reported are lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and not accompanied by any relatives able to support them, or are lewd or abandoned women:

3. The name and residence of the owner of such vessel.

**2952.** The Commissioner of Immigration, to satisfy himself whether or not any passenger who shall arrive in this State by vessels from any foreign port or place (who is not a citizen of the United States), is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become permanently a public charge, or has been a pauper in any other country, or is, from sickness or disease existing either at the time of sailing from the port of departure or at the time of his arrival in this State, a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman; no person who shall belong to either class, or who possesses any of the infirmities or vices specified herein, shall be permitted to land in this State, unless the master, owner, or consignee of said vessel shall give a joint and several bond to the People of the State of California, in the penal sum of five hundred dollars in gold coin of the United States, conditioned to indemnify and save harmless every county, city and county, town, and city of

Bond required of owner, master, or consignee of vessel.





this State against all costs and expenses which may be by them necessarily incurred for the relief, support, medical care, or any expense whatever, resulting from the infirmities or vices herein referred to, of the persons named in said bonds, within two years from the date of said bonds; and the Commissioner of Immigration shall receive from the master, owner, or consignee of every vessel which shall bring any passengers (who are of foreign birth and not naturalized) from any foreign port or place, the sum of seventy cents for every passenger examined by him as aforesaid, which said sum shall be appropriated by said Commissioner as fees and compensation for said services; and if such sum shall not be paid within three days after the arrival of said vessel, the Commissioner may bring suit at law to recover the same against the master, owner, consignee, and vessel, or either of them, jointly or severally, for the recovery of said sum, and every judgment thus obtained against said parties shall be a lien upon said vessel; and if the master, owner, or consignee of said vessel shall fail or refuse to execute the bond herein required to be executed, they are required to retain such person on board of said vessel until said vessel shall leave the port, and then convey said passengers from this State; and if said master, owner, or consignee shall fail or refuse to perform the duty and service last herein enjoined, or shall permit said passengers to escape from said vessel and land in this State, they shall forfeit to the State the sum of five hundred dollars in gold coin of the United States for each passenger so escaped, to be recovered by suit at law.

Nature of  
bond.

**2954.** The bond required by the next preceding section must be a separate bond for each passenger, and the same sureties must not be upon more than one bond. Each bond must be secured by two or more sufficient sureties, residents of the State, each of whom must prove, before the Commissioner of Immigration,

by oath or otherwise, indorsed in writing on such bond, that he is a freeholder and resident of the State, and is worth double the amount of the penalty of the bond in real estate, over and above all his debts and liabilities. The bond may, at the option of the party, be secured by mortgage on real estate, or by the pledge and transfer of United States bonds, or Controller's warrants of this State, in any amount sufficient to secure the same.

2955 of said Code is repealed.

2958. All moneys received in commutation of bonds, and paid into the State Treasury, must be placed to the credit of the General Fund. (Approved March 7th, 1874.)

Commuta-  
tion fund,  
where to be  
placed.

2961. The Commissioner receiving any commutation money, or any moneys from fines or penalties, under this Chapter, must account for and pay the same, less twenty per cent, which he may retain as his compensation, on the first Tuesday of every month, to the Treasurer of State, in the same manner in which County Treasurers account. He must specify in his account the names of the parties paying each sum of money, the date of such payment, for what paid, or the name of the vessel and the number of passengers on account of whom it was paid, or annex thereto an affidavit of its correctness. The Commissioner must also furnish to the parties paying any commutation money, or any money from other sources, receipts in duplicate, specifying the amount paid, the name of the vessel, and the number of passengers on account of whom or for what it was paid.

2967 of said Code is repealed.

Repeal.

3009. The Board of Health must appoint a Deputy Health Officer, who shall be a physician in good standing; a Secretary, two Health Inspectors, one Market Inspector, and one Messenger, whose duties must be fixed by the Health Officer.

Deputy  
health offi-  
cer, etc., to  
be appoint-  
ed.







They must also appoint one resident physician, one assistant resident physician, one steward, one matron, one first apothecary, one second apothecary, two visiting physicians, two visiting surgeons, as officers of the city and county hospital, in and for the city and county of San Francisco. One each of said visiting physicians and surgeons to be nominated by the faculty of the medical department of the University of California, and one each of said visiting physicians and surgeons to be nominated by the Medical College of the Pacific. The said Board shall also have the power to appoint one superintendent, one resident physician, one matron, and such other employees as are now authorized by law to be employed in and for the Almshouse in said city and county. The appointing power aforesaid is vested solely in said Board of Health, and said Board shall have power to prescribe the duties of said appointees and to remove the same at pleasure. (Approved March 23d, 1874. Effect immediately.)

Compensation of health officers.

3010. The following annual salaries are hereby allowed to the officers of the Health Department and such other officers as are mentioned in section one of this act, viz. : Health Officer, twenty-four hundred dollars; Deputy Health Officer, eighteen hundred dollars; Secretary, two thousand and one hundred dollars; Health Inspectors, one thousand and two hundred dollars each; Market Inspector, one thousand and two hundred dollars; Messenger, nine hundred dollars. All of said salaries must be paid in equal monthly instalments, out of the General Fund of the city and county of San Francisco, in the same manner as the salaries of the other officers of the said city and county are paid.

There shall be paid to the officers and employees of the City and County Hospital, and Almshouse, the following annual salaries, viz. : Resident Physicians, two thousand and four hundred dollars ; Assistant Resident Physicians, fifteen hundred dollars; Steward, fifteen hundred dollars; Matron, seven hundred and twenty

dollars; First Apothecary, twelve hundred; Second Apothecary, six hundred; Visiting Physicians and Surgeons, twelve hundred dollars each; Superintendent of Almshouse, eighteen hundred dollars; Resident Physician of Almshouse, fifteen hundred dollars; Matron of the Almshouse, six hundred dollars; and all other employees of said institutions are to be paid such sums as are now authorized by law, all to be paid in equal monthly instalments out of the Hospital and Almshouse Fund of said city and county of San Francisco. And the Auditor of said city and county is hereby directed to audit the said demands, payable out of the funds aforesaid, upon the approval of the same by the said Board of Health, and also to audit all demands for salaries of medical attendants and employees, appointed by the Board of Health in accordance with this Chapter, for the amounts authorized by law to be paid when the same shall have been approved by said Board. (Approved March 23d, 1874. Effect immediately.)

*AN ACT to amend an Act entitled " An Act to amend sections 3009 and 3010 of the Political Code "* [Approved March 23 (30), 1874.]

(Enacting Clause.)

SECTION 1. The Board of Health of the city and county of San Francisco shall alone have the power to appoint one City Physician, who shall receive an annual salary of nine hundred dollars, which must be paid, in equal monthly instalments, out of the general fund of the city and county of San Francisco, in the same manner as the salaries of the other officers of said city and county are paid.

SEC. 2. The said Board of Health of the city and county of San Francisco may, in their discretion, appoint one engineer and plumber, one first cook, second cook, one third cook, one baker, one butcher, one clerk and interpreter, one ambulance driver, one gatekeeper, one dresser and sixteen nurses, as employees and medical attendants of the City and County Hospital of San Francisco.

SEC. 3. The following monthly salaries are hereby allowed to said employees and medical attendants mentioned in section 2 of this Act: Engineer and plumber, \$100 per month; first cook, \$70 per month; second cook, \$40 per month; third cook, \$35 per month; baker, \$75 per month; butcher, \$40 per month; clerk and interpreter, \$40 per month; ambulance driver, \$40 per month; dresser, \$50 per month; nurses, \$40 per month each. All of said sums must be paid monthly out of the Hospital and Almshouse Fund of said city and county of San





Francisco, and the Auditor of said city and county is hereby directed to audit the said demands payable out of the fund aforesaid, upon the approval of the same by the said Board of Health.

Sec. 4. This Act shall take effect and be in force from and after its passage.

Registry of death.

3076. Physicians, who attend deceased persons in their last sickness; clergymen, who officiate at a funeral; coroners, who hold inquests; sextons and undertakers, who bury deceased persons; must each keep a register of the name, age, residence, and time of death of such person.

Duty of persons finding lost money, goods, etc.

3136. If any person find any money, goods, things in action, or other personal property, or shall save any domestic animal from drowning or from starvation, when such property shall be of the value of ten dollars or more, he must inform the owner thereof, if known, and make restitution without compensation, further than a reasonable charge for saving and taking care thereof; but if the owner is not known to the party saving or finding such property, he must, within five days, make an affidavit before some Justice of the Peace of the county, stating when and where he found or saved such property, particularly describing it; and if the property was saved, particularly stating from what and how he saved the same, stating therein whether the owner of the property is known to him, and that he has not secreted, withheld, or disposed of any part of such property.

Branding of animals.

3172. Every person must mark or brand his horses and mules before they are eight months old, and cattle before they are twelve months old, on the hip or hinder part, and mark or brand his sheep, goats, and hogs, before they are six months old. On the trial of any action to recover the possession of any animal which is marked or branded, the mark or brand is *prima facie* evidence that the animal belongs to the owner of the mark or brand. When a dispute occurs in regard to a mark or brand, the person first recording the same is entitled thereto.

3196. Trade-mark, what is and what is not. *Burke v. Cassin*, 45 Cal. 467. See generally, *Falkenburg v. Lucy*, 35 Cal. 52; *Graham v. Plate*, 40 Cal. 593.

3292. Every auctioneer, in case of inability to attend an auction by reason of sickness, or the performance of any duty imposed upon him by law, or during a temporary absence from the city or county within which he is auctioneer, may employ a co-partner or clerk to hold such auction in his name and behalf; such employee to take and file with the Clerk of the county an affidavit faithfully to perform the duties of auctioneer. But any auctioneer may employ a crier at any sale, for whose acts he shall be responsible. (Approved March 30th, 1874. Effect immediately.)

Substitute,  
who may be,  
and when.

3341. The Secretary of the Fire Department, or fire company, must keep a record of all certificates of exemption or active membership, the date thereof, and to whom issued; and when no seal is provided, similar entries of certificates issued to obtain County Clerk's certificates. Every such certificate is *prima facie* evidence of the facts therein stated.

Record of  
member-  
ship of fire  
depart-  
ment.

3364. For each license issued, the Collector must collect a fee of one dollar, which must be paid into the Salary Fund of the county, unless the Auditor and Collector are paid by fees instead of salaries, in which case the dollar must be equally divided between them; *provided*, that in the County of Sierra the fee so collected shall belong to the Collector. (Approved March 24th, 1874. Effect immediately.)

Fees for  
issuance of  
licenses.

3364. For each license issued, the Collector must collect a fee of one dollar, which must be paid into the Salary Fund of the county, unless the Auditor and Collector are paid by fees instead of salaries, in which case the dollar must be equally divided between them. The license issued must be for a term designated by the person taking it, not to exceed twelve months, and not less than the shortest term fixed in this chapter.

Fees on  
license  
issued.







Licenses.

**3380.** Licenses must be obtained for the purposes hereinafter named, for which the Tax Collector must require payment as follows:

Billiards.

1. From each proprietor of a billiard table, not kept exclusively for family use, for each table, five dollars per quarter; and for a bowling alley, five dollars per quarter for each alley; but no license must be granted for a term less than three months;

Theaters.

2. Theaters are divided into two classes; those seating nine hundred and seventy-five or more, are of the first-class; those seating less than nine hundred and seventy-five, are of the second-class. One seat is twenty-two inches. License shall be granted to theaters and other places of amusement according to the following schedule: If for less than one month, first-class, five dollars per day; second-class, five dollars per day. If for one month, and less than three months, first-class, one hundred dollars per month; second-class, seventy-five dollars per month. If for three months, and less than one year, first-class, three hundred dollars per quarter; second-class, two hundred dollars per quarter. If for one year, first-class, six hundred dollars; second-class, four hundred dollars;

Menagerie.

3. For each exhibition for pay for a caravan or menagerie, or any collection of animals, circus, or other acrobatic performance, ten dollars; and for each show for pay of any figures, jugglers, necromancers, magicians, wire or rope dancing, or sleight of hand exhibition, five dollars each day;

Pawn-brokers.

4. From each pawnbroker, thirty dollars per quarter;

Intelligence Offices.

5. From each keeper of all intelligence offices, fifteen dollars per quarter.

Stats. 1861, p. 441, Sec. 73.

Merchants and keepers of livery stables licenses.

**3382.** Every person who, at a fixed place of business, sells any goods, wares, or merchandise, wines or distilled liquors, drugs or medicines, jewelry or wares of precious metals, whether on commission or otherwise (except agricultural or vinicultural productions,

or the productions of any stock, dairy or poultry farm of this State, when sold by the producer thereof, and except such as are sold by auctioneers at public sale under license), and all persons who keep horses or carriages for hire (except such as are used in the transportation of goods), must obtain from the Tax Collector of the county in which the business is transacted, and for each branch of such business, license, and pay quarterly therefor an amount of money to be determined by the class in which such person is placed by the Tax Collector; such business to be classified and regulated by the amount of the average monthly sales made or hiring done, and at the rates following:

1. Those who are estimated to make average monthly sales or hiring to the amount of one hundred thousand dollars or more, constitute the first class, and must pay fifty dollars per month;

2. Of seventy-five thousand dollars, and less than one hundred thousand dollars, constitute the second class, and must pay thirty-seven dollars and fifty cents per month;

3. Of fifty thousand dollars, and less than seventy-five thousand dollars, constitute the third class, and must pay twenty-five dollars per month;

4. Of forty thousand dollars, and less than fifty thousand dollars, constitute the fourth class, and must pay twenty dollars per month.

5. Of thirty thousand dollars, and less than forty thousand dollars, constitute the fifth class, and must pay fifteen dollars per month;

6. Of twenty thousand dollars, and less than thirty thousand dollars, constitute the sixth class, and must pay ten dollars per month;

7. Of ten thousand dollars, and less than twenty thousand dollars, constitute the seventh class, and must pay seven dollars and fifty cents per month;

8. Of five thousand dollars, and less than ten thousand dollars, constitute the eighth class, and must pay five dollars per month;





9. Of two thousand five hundred dollars, and less than five thousand dollars, constitute the ninth class, and must pay three dollars per month;

10. Of all amounts over twelve hundred and fifty dollars, and under two thousand five hundred dollars per month, constitute the tenth class, and must pay one dollar and fifty cents per month;

11. Of all amounts less than twelve hundred and fifty dollars per month constitute the eleventh class, and must pay one dollar per month. (Approved March 10th, 1874. Effect immediately.)

*AN ACT to permit the voters of every Township or Incorporated City in this State to vote on the question of granting License to sell Intoxicating Liquors. [Approved March 18, 1874.]*

(Enacting Clause.)

Voters of Township, City or Town, may petition for prohibition of issuance of license to sell liquor.

SECTION 1. From and after the passage of this Act, whenever one fourth the number of legal voters of any township, incorporated city, or town, shall petition the Board of Supervisors of such county, or the county wherein such township, incorporated city, or town is situated, to call a special election, to vote upon the question of "Liquor License," or "No Liquor License," the Board of Supervisors of the county receiving said petition, shall, within one month after said petition is filed with the Clerk of said Board, make proclamation for the holding of said election in the township, incorporated city, or town, as may be asked for in such petition.

Proclama- of election to be published.

SEC. 2. The Board of Supervisors shall, by such proclamation, require an election to be held within such township, incorporated city, or town, as the case may be, on a day to be designated by such Board, and within thirty days from and after the day of issuance of said proclamation. Such proclamation shall be published in a newspaper printed in the township, city, or town, in which said election is to be held, if there be one published therein, otherwise, in a newspaper to be designated by such Board of Supervisors. Such a proclamation shall be published once a week, for at least three weeks, previous to said election.

Election, how conducted.

SEC. 3. Said election shall be conducted and governed by the General Election Laws of this State, so far as the same are applicable thereto; *provided*, that copies of the Great Register need not be used, and section one thousand and fifty-six of the Political Code shall not apply to or affect such elections.

Tickets, what to contain.

SEC. 4. The tickets voted at such elections shall contain the words, "For License," or "Against License." If a majority of the votes cast at such election "For License" or "Against License," shall contain the words, "Against License," then it shall not be lawful for any Court, Board, or officer, to issue any license for the sale of any spirit-

uous, vinous, malt, or other intoxicating liquors in said township, city, or town, wherein said election may have been held, at any time after the determination of the result of said election ; *provided*, that nothing contained in the provisions of this Act shall prevent the issuing of license to druggists for the sale of liquors for medicinal and manufacturing purposes.

SEC. 5. The Board of Supervisors shall meet as a Board within ten days after any such election, for the purpose of canvassing the returns and determining the results.

Canvassing returns, and declaring result.

SEC. 6. If, at any such election, the majority of votes cast "For License" and "Against License," shall be "Against License," then from and after the result of said election shall have been determined by the Board of Supervisors, it shall be unlawful for any person to sell or dispose of any spirituous, vinous, malt, or other intoxicating liquors in such township, incorporated city, or town, in less quantities than five gallons at any time thereafter, until at an election, as above provided, a majority shall vote in favor of such license.

Effect of result, when "against license"

SEC. 7. No election shall be held under this Act oftener than once in two years.

Election not to be held oftener than once in two years.

SEC. 8. Any person who shall sell or give, or offer to sell or give, any spirituous, vinous, malt, or other intoxicating liquors, within any township, incorporated city, or town, contrary to the provisions of this Act, shall be guilty of a misdemeanor, and for every such offense shall pay a fine not exceeding twenty-five dollars for the first offense, and not less than fifty or more than one hundred dollars for each subsequent offense, and be imprisoned in the County Jail until such fines shall be paid, not to exceed one day for every one dollar of the fine.

Selling or giving liquor in violation of this act, a misdemeanor.

Penalty.

SEC. 9. All fines collected under this Act shall be paid into the County School Fund of the county wherein collected.

Fines, how disposed of.

SEC. 10. It shall be the duty of the County Judge to call the attention of every Grand Jury to the provisions of this Act.

Duty of County Judge.

SEC. 11. This Act shall take effect immediately.

§3399, 3400, 3401, 3402, 3403, and 3404 are hereby repealed, and the following section added, approved January 19, 1874:

The person who has been acting as Land Agent, under the sections hereby repealed, is hereby ordered and directed to return to the Surveyor-General of this State all maps, documents, and papers, now in his possession, or under his control, touching the lands of this State, furnished him by the officers of this State or of the United States, at his earliest convenience. (Approved January 19th, 1874. Effect immediately.)







**3406.** If it appear that the land was duly located by the State Locating Agent for the benefit of the State, at the United States Land Office, with the consent of the Register and Receiver, and that such location appears in their official books, a sufficient consent is thereby shown to the location on the part of the United States. *Rush v. Casey*, 39 Cal. 339. A suit concerning the right to purchase lien lands cannot be commenced in the Courts until the Surveyor-General has made application to the Register of the proper land office to have the land accepted in part satisfaction of the grant under which it is sought to locate them. *Berry v. Cammet*, 44 Cal. 348. Lien lands cannot be sold by the State officers until the selection of them by the State has been approved by the register of the proper land office. *Id.*

**3407.** Consent of the United States to entry of land by State, manifested by certificate of the Register of United States lands. *People v. Athearn*, 42 Cal. 607. Confirmation of State selections upon unsurveyed public lands. *Toland v. Mandell*, 38 Cal. 30. The Commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the Acts of Congress, have the force and effect of laws. *People v. Athearn*, 42 Cal. 607. The land will not be certified to the State until the claim is presented and proved up. *Collins v. Bartlett*, 44 Cal. 371.

**3408.** Under the Act (Stat. 1863, p. 591), the Register's certificate of purchase of school or lien land is the only *prima facie* evidence of title prior to a patent. *True v. Thompson*, 42 Cal. 295. This Act inaugurated a new system of land law, intended to be complete in itself. *Id.* Certificate of purchase *prima facie* evidence of purchase in good faith. *Hodapp v. Sharp*, 40 Cal. 69. The selection is not confirmed, nor does the title pass until the land is certified over to the State. *Id.* *Collins v. Bartlett*, 44 Cal. 371.

**3412.** Where the evidence shows that the land selected has been certified over to the State by the Commissioner of the General Land Office, though the date of the certificate is not given, if no objection is made to the evidence, it will be presumed that it was done prior to the commencement of the action. *Hodapp v. Sharp*, 40 Cal. 69.

**3418.** The provisions of the Act of May 3d, 1852, for the survey of public land by County Surveyors, apply to such land only as have not been surveyed by the United States. *Popper v. Athearn*, 42 Cal. 607.

**3418, 3419, 3420, 3421, repealed.** (Approved March 28th, 1874. Effect immediately.)

**3429.** Only such portions of prior Acts as were repugnant to the Act of 1863 were superseded. *Chapman v. Buckman*, 39 Cal. 674. Section four of the Act of April 23, 1858, which provides that the Lo-

ating Agent shall not locate more than three hundred and twenty acres, either directly or indirectly, for any one person, was not amended nor repealed, so as to abrogate or dispense with such limitation until the Act of March 28, 1868. *Id.*

**3440.** Object of Congress in granting swamp lands to State, and obligations of the State in accepting the grant. *Kimball v. Reclamation Fund Commissioners*, 45 Cal. 344. Payment of installments on purchase money. *People v. Washington*, 40 Cal. 173. Time of first payment. *Carpenter v. Sargent*, 41 Cal. 557. The failure to pay within the time is an abandonment of the purchase. *Id.* A failure to pay the interest annually, and to pay the principal at the end of five years, under the Act of 1855, works a forfeiture, and the State may resell as if no purchase had been made. *Borland v. Lewis*, 43 Cal., 569.

**3441.** The Surveyor General of the State must not approve any application, nor must the Register issue evidence of title, for swamp and overflowed land, until six months after the same has been segregated by authority of the United States. (Approved March 28th, 1874. Effect immediately.)

Application not to be approved until land segregated.

**3443.** Any person desiring to purchase swamp and overflowed or tide lands above low tide, must make an affidavit and file the same in the office of the Surveyor General of the State, that he is a citizen of the United States, or has filed his intention to become so, a resident of the State, of lawful age; that he desires to purchase lands (describing them) under the law providing for the sale of swamp, and overflowed, and tide lands; that he does not know of any valid claim to the same, other than his own, and if the land is swamp and overflowed, that he knows the land applied for, and the exterior bounds thereof; and knows of his own knowledge that there are no settlers thereon, or, if there are, that the land has been segregated more than six months by authority of the United States, and that the land which he now owns (swamp and overflowed), together with that sought to be purchased, does not exceed six hundred and forty acres. (Approved March 28th, 1874. Effect immediately.)

Application for purchase of swamp, etc. land.

Affidavit what to contain.





**3443.** An application to buy tide land, made in accordance with law, confers a right to purchase upon the applicant which, as against the State and all subsequent applicants, can be lost only by the failure of the applicant to pursue the further steps prescribed by the statute; not through the fault of any officer. *Hinckley v. Fowler*, 43 Cal. 59. The application must contain an intelligible description of the lands sought to be purchased. If the description be unintelligible, it will not support the application in the case of a contest. *Miller v. Taylor*, 45 Cal. 219. A description which the County Surveyor can understand is sufficient. The survey which it is his duty to make ought to fix the lines with the requisite precision. *Hinckley v. Fowler*, 43 Cal. 59.

Applica-  
tion, to  
whom to be  
made.

**3445.** Any person desiring to purchase lands as provided in §3443 of this Code, which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the Surveyor of the county in which the land is situated to have the land which he desires to purchase surveyed, and a certificate of such survey must be attached to the affidavit required for the purchase of lands, as provided in said section. All surveys required of County Surveyors by the provisions of this section must conform as nearly as practicable to the system adopted by the United States for the survey of the public lands. (Approved March 28th, 1874. Effect immediately.)

Petition for  
formation  
of reclama-  
tion dis-  
trict.

**3446.** Whenever the holders of title or evidence of title representing one half or more of any body of swamp and overflowed, salt marsh, or tide lands, susceptible of one mode of reclamation, desire to reclaim the same, they may present to the Board of Supervisors of the county in which the lands or the greater part thereof are situated, at a regular meeting of the Board, a petition, setting forth that they propose to form a district for the reclamation of the same, a description of the lands by legal subdivisions or other boundaries, the county in which they are situated, the number of acres in the proposed district, and in each tract, with the names (if known) of the owners thereof, and designating as unsold any lands not reduced to private ownership.

**3449.** If the Board of Supervisors find, on the hearing of the petition, that its statements are correct, they must make an order approving the same. If it be shown that any land has been improperly included in or excepted from the proposed district, they must reform the district in such respects in their order. The order of approval must be indorsed on or attached to the petition, and be signed by the President and attested by the Clerk of the Board.

Proceedings  
on appeal of  
petition.

**3449.** Right of applicant where less than the tract applied for is approved. Id.

**3451.** The Register must thereupon forward to the County Treasurer a statement showing the names of purchasers of land in the district, who have paid in full therefor.

Duty of Re-  
gister on re-  
ceipt of  
copy.

**3452.** After the approval of the petition, the petitioners, or a majority of them, may make by-laws for the management of the district, and must elect three persons owning land in the district, to act as a Board of Trustees thereof, who shall keep their office in the district or as near as practicable for the transaction of all business pertaining to the reclamation of the district, and their books and papers shall be opened to inspection by any one person interested at all times.

District by-  
laws and  
trustees.

**3456.** The Board by which the district was formed must appoint three Commissioners, disinterested persons, resident of the county in which the district or some part thereof is situated, who must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works, and estimated in gold and silver coin of the United States. The same must be collected and paid into the County Treasury as hereinafter provided, and be placed by the Treasurer to the credit of the district, and paid out for the work of reclamation upon the warrants of the Trustees, approved by the Board of Supervisors of the county.

Commis-  
sioners to  
assess  
charges for  
reclamation  
purposes in  
Coin.







**3456.** Assessing swamp lands to pay the cost of reclamation.  
Kimball v. Reclamation Fund Commissioners, 45 Cal. 344.

Warrants,  
how pre-  
sented.

Interest.

Additional  
may be as-  
sessed.

**3457.** The warrants drawn by the Trustees must, after they are approved by the Board of Supervisors, be presented to the Treasurer of the county, and if they are not paid on presentation, such indorsement must be made thereon, and they must be registered and bear interest from date of presentation, provided warrants heretofore issued shall bear no interest.

**3459.** If the original assessment is insufficient to provide for the complete reclamation of the lands of the district, or if further assessments are from time to time required to provide for the protection, maintenance, and repair of the reclamation works, the Trustees must present to the Board of Supervisors by which the district was formed, a statement of the work done, or to be done, and its estimated cost, and the Board must make an order directing the Commissioners who made the original assessment, or other Commissioners, to be named in such order, to assess the amount of such estimated cost as a charge upon the lands within the district, which assessment must be made and collected in the same manner as the original assessment.

Form of list

**3461.** The list must contain:

1. A description by legal subdivisions, swamp land surveys, or natural boundaries of each tract assessed;
2. The number of acres in each tract;
3. The names of the owners of each tract, if known; and if unknown, that fact;
4. The amount of the charge assessed against each tract.

Li-ts. how  
and where  
filed.

**3462.** The list so made must be filed with the Treasurer of the county, or if the district is situated in different counties, then the original list must be filed in the county where the petition was filed, and copies thereof, certified by the Commissioners, must be filed with the Treasurer of each of the other counties.

**3464.** When the list, or a certified copy thereof, is filed, the Treasurer must credit thereon, to each purchaser who has paid in full for his land, eighty cents per acre, less any amount chargeable against him, and must transfer the amount to the credit of the district.

Credit to be  
given to  
owners of  
land.

**3466.** If, at the end of thirty days, or of the longer time fixed by the Trustees, all of the assessments have not been paid, the Treasurer must return the lists to the District Attorney, who must commence actions for the collection of such delinquent assessments with the interest thereon from the time the lists were returned to him, and costs, and for the enforcement of the lien on the land assessed, in the District Court of the county in which the same is situated, against the person to whom the same is assessed, and if assessed to unknown owners, then against the real owners, and all persons having or claiming any interest therein, by fictitious names. Service of complaint and summons in such actions may be made either in the manner prescribed by the Code of Civil Procedure, or by posting a copy of the summons at the Court House door, and publishing the same once a week for four successive weeks, in a newspaper published in the county, and such posting and publication is equivalent to personal service on all persons having, or claiming any right, title or interest in the land assessed, whether named as a party in such action or not. Proof of such posting and publication must be made by the certificate of the Sheriff, or affidavit of the District Attorney. In case the service be made by posting and publication, the defendant or any person claiming any interest in the land assessed, may appear and answer the complaint within forty days after the expiration of the four weeks of posting and publication. Assessments on several tracts may be included in the same action, if listed to the same person. In such action the Court may decree and adjudge a lien against the tracts assessed, and order them to be sold on execution or decree, as in other cases of sale of real

Delinquent  
charges,  
how collect-  
ed.

Enforce-  
ment of  
lien.





estate. The judgment or decree must direct that the sale be made for gold and silver coin of the United States. The District Attorney must pay the moneys collected to the County Treasurer, who must place the same to the credit of the district.

Contract by  
Board of  
Supervisors

**3475.** The Supervisors shall have power, on application of the Trustees or owners of any swamp land district, to approve and let any contract to the lowest responsible bidder, and order the County Treasurer to pay for the same out of the funds of the district.

Completion  
of reclama-  
tion to be  
certified to  
Register.

**3476.** Whenever the Trustees, or owners of land, if there be no Trustees, certify under oath to the Board of Supervisors who formed the district, and show to their satisfaction that the works of reclamation are completed, or that two dollars per acre in gold coin has been expended on the works of reclamation, the Board of Supervisors must thereupon certify such facts to the Register.

If lands  
have been  
reclaimed,  
patents to  
issue.

**3477.** The Register must thereupon credit each purchaser in the district with payment in full for such lands, and the purchasers are entitled to patents therefor, and the Register must forward to the Treasurer of the county in which any part of the district is situated, a statement, showing the amount paid by each purchaser in the district, including interest, and the County Treasurer, after deducting all amounts chargeable against the lands in said district, by reason of moneys drawn from the Swamp Land Fund of the county, must divide the balance pro rata amongst the original purchasers of land in the district, or their assigns, and must pay to each purchaser or his assigns, on demand, the amount found to be due to him from such computation, out of the moneys in his hands to the credit of the Swamp Land Fund of the county. Neither this nor the preceding section applies to districts having outstanding indebtedness represented by Controller's warrants drawn on the State Treasury, until all such warrants are fully paid.

**3482.** The district so set off shall be liable for its just proportion of the legal indebtedness of the original district from which it was set off, when the same shall have been ascertained by law. (Approved March 28th, 1874. Effect immediately.)

Liability of new district for proportion of old indebtedness.

**3489.** Two or more contiguous districts may be consolidated by the written concurrence of a majority in acreage, of the land owners of such district. An agreement, stating the terms of such consolidation, and the names of the Trustees of the consolidated district, must be signed by the Trustees of each district, or a majority of them, and be recorded in the Recorder's office of the county in which the districts are situated. A certified copy shall be sent to the Register of the Land office, and he must number such district as Consolidated District, No. —, and send the number to the County Recorder, in which the districts are situated, and the consolidated district must thereafter be known and designated thereby.

Districts may be consolidated.

**3490.** Any person who shall cut, injure or destroy any levee, or other works of reclamation in any district, is responsible for all damages which may be occasioned thereby to such levee works; and an action therefor must be brought in the District Court of the county, or either of the counties, in which such levee or works are situated, in the names of the Trustees of the district. If there be no Trustees, then the action may be brought in the name of any land owner in the district. The amount recovered in such action must be paid to the Treasurer of the county, who must place the same to the credit of the district.

Injury to levee.

Action.

Parties.

**3495.** No rights will attach in favor of an applicant to purchase school land from the State under the Act of 1863, until he files the affidavit prescribed by sections twenty-eight and twenty-nine of that Act, endorsed on a description of the land, in the office of the County Recorder. *Hogan v. Winslow*, 45 Cal. 588. It is only necessary that it should be filed within a reasonable time before or after the proceedings, and for the purposes of the intended purchase. *Id.* No title to the land, and no right of possession or of purchase, inchoate or otherwise,







attaches from any proceedings taken, until a certificate of the oath, prescribed by section twenty-eight of the Act of 1863, is endorsed on the description of the land, and filed in the office of the County Recorder. *Dunn v. Ketchum*, 38 Cal. 93. Location of sixteenth or thirty-sixth section, when void. *Hildebrand v. Stewart*, 41 Cal. 387. When the law under which public lands are sold requires certain acts to be performed as a prerequisite to the right to purchase, the Courts cannot dispense with the performance of these acts, by legalizing an entry made without complying with them. *Hildebrand v. Stewart*, 41 Cal. 387.

3497. What constitutes an occupant under the Act of April 27th, 1863. *Hildebrand v. Stewart*, 41 Cal. 387.

3499. The judicial department of the State has no jurisdiction of controversies arising between applicants for the purchase of State lands, except such cases where the jurisdiction is expressly conferred by statute. *Berry v. Cammet*, 44 Cal. 348. Under the twenty-fifth section of the Act of 1863, for the sale of tide lands, when a contest is referred to the Courts for settlement, it is to be determined upon the principles of law and equity involved. *Hinckley v. Fowler*, 43 Cal. 59. The Surveyor General is to determine only those contests about the purchase of lands in which the survey, "or purely a question of fact," is involved. *Id.* A question of law is to be referred to the Courts. *Id.*

3502. Under the Act of 1852, school lands warrants can only be located on lands belonging to the United States or to the State, subject to such location. *Farish v. Coon*, 40 Cal. 33. The location of school land warrants on tide lands belonging to the State cannot be approved. *Id.* The location of school land warrants issued under the Act of May 3d, 1852, upon unsurveyed lands of the United States, is void, and confers no right whatever upon the locator. *Hastings v. Devlin*, 40 Cal. 358. The location of school land warrants, issued by this State, prior to the survey of the land on which they are located by the United States, is void. *Collins v. Bartlett*, 44 Cal. 371.

Settlers upon rejected grants preferred purchasers.

AN ACT to protect bona fide Settlers upon Public Lands. [Approved March 23, 1874.]

(Enacting Clause.)

Application, when to be made.

SECTION 1. Bona fide settlers upon any sixteenth or thirty-sixth section, which at the time of such settlement was embraced within any survey made under claim or color of any Spanish or Mexican grant, but which has since been or hereafter may be restored to the public domain by the proper officers of the Government of the United States, shall be preferred purchasers for the lands so settled upon by them to the lines of their actual possession, and in accordance with the general system of Government surveys, and not exceeding three hundred and twenty acres; and all applications made by such settlers to purchase said lands from the State, within one year from the date of such restoration, are

hereby declared to entitle said settlers to become preferred purchasers for the lands so held as aforesaid, in the same manner and to the same extent as if made within the sixty days, as now provided for by law; and said sixty days' preferment is hereby extended to, and declared to be, one year from the date of such restoration; and all such applications made within one year from the date of said restoration shall be held and deemed as valid and binding as if made within sixty days from the date of such settlement.

Sec. 2. This act shall take effect and be in force from the time of its becoming a law.

3503. In all cases where any person has purchased any part of a sixteenth or thirty-sixth section from the United States, or shall hereafter make such purchase, or shall be an actual settler on any sixteenth or thirty-sixth section, and entitled to a preemption thereto under the laws of the United States, for which lands this State has received indemnity, or will or would be entitled to indemnity under the laws of the United States, the right of the State to such sixteenth and thirty-sixth sections, or parts thereof, are relinquished to the United States for the use of such purchasers and their assignees, and of such preëmtors. When any person who is in good faith a settler upon any such lands, fails to acquire a title thereto from the United States, he may, within six months after such failure, apply to the State to purchase the same, and his application shall have preference over all other applications for the purchase of such lands.

Right of  
pre-emp-  
tion on  
school land  
sections.

3513. An applicant, under the Act of 1868, who has obtained a certificate of location from the Surveyor General, but has failed to pay the installment of twenty per cent. within fifty days from the date of the certificate, will be considered as having abandoned his exclusive right to purchase, and the Surveyor General may issue a new certificate to another applicant for the purchase of the same lands. *Eckart v. Campbell*, 39 Cal. 256.

3514. Whenever the Register receives from a County Treasurer a statement showing that an applicant for State lands has made the first payment, he must issue to the person entitled thereto a certificate of purchase, showing the class of land purchased, the number of

Register to  
issue cer-  
tificates of  
purchase.





acres, the price per acre, the date of payment, the date from which interest is to be computed, the amount paid and the amount remaining unpaid, which certificate is *prima facie* evidence of title.

Duplicate  
for lost cer-  
tificate.

**3518.** If the owner of a certificate of purchase claims that it has been lost, destroyed, or is beyond his control, the register must take testimony concerning the loss, destruction, or reason why the same is beyond his control. But the party must, before the hearing, make affidavit that he has not sold the said certificate of purchase, or the land described therein; and must publish a notice in some newspaper in the county where the land is situated; or if there is no newspaper published in the county, then in some newspaper of general circulation in the county, for at least four weeks, describing the certificate and the lands for which the same was issued, stating the name of the person to whom the same was issued, and the person then claiming to own it, together with the time and place of the hearing. If the register is satisfied of the loss or destruction of the certificate, or that it is beyond the control of the person owning the same, he must issue to the owner thereof a duplicate, with the word "duplicate" written across the face thereof in red ink. Such duplicate shall have the same force and effect as the original. If there is a contest as to the issuing of a duplicate certificate, the Register may hear and determine the same, or may refer it to the proper Court, as provided in section three thousand four hundred and fourteen.

Affidavit of  
applicant  
for pur-  
chase of  
School  
lands con-  
taining  
minerals.

AN ACT regulating the sale of Mineral Lands belonging to the State. [Approved March 28, 1874.]

(Enacting Clause.)

**SECTION 1.** Any person desiring to purchase from this State any portion of any sixteenth or thirty-sixth section, that shall have been designated by United States survey as of a mineral character, or which is so in fact, shall make an affidavit before some officer authorized to administer oaths, that he or she is a citizen of the United States, or, if a foreigner, that he has filed his intention to become a citizen of the United States; that he or she is of lawful age, and desires to purchase said land, giving a description thereof by legal subdivisions; that he or she

has not entered any portion of such mineral lands which, together with that applied for in such affidavit, will exceed forty acres; that there is no occupation of said land adverse to that which he or she holds; or, if there be any adverse occupation thereof, then he or she must state the name of such adverse occupant, together with the fact that the plat of the township has been on file six months or over, and that such adverse occupant has been in such occupation six months or over.

Sec. 2. Any person that shall be in the actual possession of any of said lands described in section one, at the time of the survey thereof by the United States, or at the time of the passage of this Act, shall be considered a preferred purchaser thereof; *provided*, he or she make his or her application for the purchase of the same within six months after the filing of the plat of such survey in the United States Land Office, or within ten months after the passage of this Act.

Occupant a preferred purchaser.

Sec. 3. When a contest shall arise as to the mineral character of the lands applied for, or from any other cause, the Surveyor-General, or the Register before whom the contest is made, must, within thirty days after the adverse application is filed, unless sooner referred at the request of either claimant, make an order referring such contest to the District Court of the county within which the land is situated, and must enter such order in the proper book of said office, and forward a copy thereof to the clerk of the Court to which the reference is made. Upon the filing of a copy of such order with the clerk of the Court, either party may commence an action in said Court to determine the conflict, and the Court shall have full and complete jurisdiction to hear and determine the same. Unless an action shall be commenced within ninety days after the copy of the order of reference shall have been filed with the clerk of the Court, the party making such demand, or the adverse claimant, if the case is referred without demand, shall be deemed to have waived and surrendered his or her right to purchase, and the Surveyor-General or Register shall proceed as though his or her application had not been made.

Contest, when it arises, proceedings thereon.

Sec. 4. All lands sold under the provisions of this Act shall be sold for the sum of two dollars and fifty cents per acre, in United States gold coin, payable to the Treasurer of the county in which the lands are situated, within fifty days from the date of the approval by the Surveyor-General; and in case said payment is not made within said fifty days, the land described in the location shall revert to the State without suit, and said location shall be and become null and void. All payments made to the County Treasurer as above provided, shall be paid over and accounted for as other moneys received for State lands are required to be paid over and accounted for.

Amount to be paid, and payments, how made.

Sec. 5. The Surveyor-General and Register shall, in the matter of approving locations, issuing certificates of purchase or patents, or in other proceedings relating to the sale of lands of a mineral character, which proceedings are not provided for in this Act, proceed in the same manner as is now provided for the sale of sixteenth and thirty-sixth sections which are not of a mineral character.

Proceedings in approving locations, etc., how.







School  
lands sub-  
ject to right  
of way for  
water  
ditches, etc.

SEC. 6. All patents issued by the State to any portion of any sixteenth or thirty-sixth section shall be subject to any vested and accrued water rights, ditches, and reservoirs used in connection therewith, acquired by priority of possession under local customs and the decisions of the Courts, and the right of way for the construction of ditches and canals for mining and other purposes, over all of the sixteenth and thirty-sixth sections owned by the State, is hereby granted and confirmed.

Patents to  
land occu-  
pied in part  
as mining  
claims,  
when and to  
whom to  
issue.

SEC. 7. After the passage of this Act, no patent shall be issued by the State for any of the lands described in this Act, upon which, at the time of the application therefor, there was, and still is, any actual *bona fide* mining claim, except to the person who is the owner of such mining claim, under local mining customs, and not to such owner in excess of forty acres; and when an applicant for such lands, not owning such mining claim, shall have paid the purchase money therefor, in whole or in part, he may present his certificate of purchase, and receive in exchange therefor from the Register a certificate showing the whole amount paid; and the Controller, upon the surrender of such certificate, must draw his warrant in favor of the person surrendering such certificate, for the amount therein specified, on the Treasurer of State, who must pay the same out of the fund into which the purchase money was paid; *provided*, that the owner of such mining claim, under such mining customs, shall apply to purchase the same within six months after the plat of the township containing such land shall have been filed in the local United States Land Office, or within ten months after the passage of this Act; and, *provided further*, that any owner of a *bona fide* mining claim, who shall have entered into an agreement with the applicant for any portion of the sixteenth or thirty-sixth section, upon which said mining claim is situated, for the procurement of a title for the same, shall not avail himself of the provisions of this section. The Governor of this State shall not sign any patent contrary to the provisions of this Act.

SEC. 8. All Acts and parts of Acts in conflict with this Act are hereby repealed.

SEC. 9. This Act shall take effect and be in force from and after its passage.

Fees, appli-  
cation of

3574. Each application for lands must be accompanied by a fee of five dollars. The Surveyor-General may charge the same fees as are allowed the Register for like services, and fees collected by the Surveyor General or Register may be used in defraying the expenses of procuring maps, records, and documents, and extra assistance in the office of either; the balance thereof, if any, to be paid into the State Treasury quarterly, on the first Monday in January, April, July and

October. The Surveyor-General must, in his biennial report, include a statement of the amount of fees received by both, and how the same were disposed of.

3585. The Act of February 20th, 1868, granting certain lands held in trust by the State, in Yosemite Valley, to Hutchings and Lamon, being in terms not to take effect until after its ratification by Congress, cannot, on the absence of such ratification, have any force or serve as a muniment of title, to protect the contemplated grantees against an ejectment brought by the Commissioners appointed to manage the property. *Low v. Hutchings*, 41 Cal. 634.

3607. Where the general revenue law subjects all solvent debts to taxation, any other law which singles out a class of such debts, and exempts them from taxation is repugnant to the Constitution, which provides that taxation shall be equal and uniform throughout the State. *People v. McCreery*, 34 Cal. 433; *People v. Gerke*, 35 Cal. 677; *People v. Black Diamond C. M. Co.*, 37 Cal. 54; *People v. Whartenby*, 38 Cal. 461. [Approved.] *People v. Eddy*, 43 Cal. 333. It was not intended by the Constitution that the Legislature should have the power to exempt any kind of property from taxation. *Id.* Is the statute allowing the Assessor to deduct from solvent debts due the taxpayer the amount of his indebtedness, constitutional. *Lick v. Austin*, 43 Cal. 590. Choses in action are property subject to taxation, even when secured by mortgage. *Lick v. Austin*, 43 Cal. 590. It was the purpose of the Acts (Stat. 1870, pp. 584, 710), to exempt from taxation solvent debts secured by mortgage upon real estate, and not merely to regulate the duties of Assessors. *People v. Eddy*, 43 Cal. 333. If land subject to a mortgage is taxed, and the debt secured by the mortgage is also taxed, and the tax on the debt is paid by the mortgagee, the mortgagor cannot complain of double taxation. *Lick v. Austin*, 43 Cal. 590. The Legislature is not prohibited by the Constitution from creating more than one revenue district in a county, and providing for the election of Assessors and Collectors of revenue in each district. *People v. C. P. R. R. Co.*, 43 Cal. 399.

3607. A clause in an Act imposing a tax which allows the Board of Supervisors to remit the tax upon such property as they may deem just, does not render the whole Act unconstitutional. *People v. Whyler*, 41 Cal. 351. An act taxing the property of a district for local improvement, which exempts personal property from its operation, is unconstitutional, because not levied on all the property in the district. *People v. Whyler*, 41 Cal. 351. The principle upon which the business of a corporation, created by the Federal Government as an agent in the execution of its powers, is exempt from State taxation, does not apply to the real property of the corporation lying within the limits of a State. *People v. C. P. R. R. Co.*, 43 Cal. 399.





Certain  
terms and  
phrases de-  
fined.

**3617.** Whenever the terms mentioned in this section are employed in this title, they are employed in the sense hereafter affixed to them:

*First.* The term "real estate" includes:

1. The ownership, or claim to, possession of, or right to possession of land, and trees, vines, growing crops, and plants while growing and rooted in the ground, except plants and trees grown in nurseries for propagation and sale;

2. All mines, minerals, and quarries, in and under the land, and all rights and privileges appertaining thereto;

3. Improvements.

*Second.* The term "improvements" includes all buildings, structures, fixtures, fences, and improvements, erected upon, or affixed to, the land.

*Third.* The term "personal property" includes everything which is the subject of ownership, not included within the meaning of the term "real estate."

*Fourth.* The term "full cash value" means the amount at which the property would be appraised, if taken in payment of a just debt, due from a solvent debtor. (Approved March 30th, 1874. Effect immediately.)

**3627.** Assessment of land as an entirety. *People v. Shimmeris*, 42 Cal. 123. Right to be assessed in severalty. *Id.* Blocks of land in a city may be assessed by blocks, when they are assessed to the owner, even if they have been subdivided into lots. *People v. Culverwell*, 44 Cal. 620; *People v. Morse*, 43 Cal. 534. In assessing land for taxation, the Assessor cannot deduct from its value the amount due on mortgages by which it is encumbered, and call the remainder its assessed value. *Lick v. Austin*, 43 Cal. 590. A tax on the property of a township for a Township Road Fund must be assessed by an assessor elected by the electors of the township. *People v. Sargent*, 44 Cal. 430. A County Assessor cannot assess the property of a township for a tax levied on the township property, to raise a fund for township purposes. *Id.* The lien of a tax extends back to the assessment, and the assessment creates a lien, which is not extinguished till the tax is paid. *Reeve v. Kennedy*, 43 Cal. 643. The assessment of taxes and the lien which it creates, are matters of public record, of which all purchasers are bound to take notice, and the purchaser of land is bound at his peril to see that taxes have been paid. *Id.*

**3630.** The Board of Supervisors must furnish the Assessor with "blank forms" of the statements provided for in the preceding section, affixing thereto an affidavit, which must be substantially as follows :

Supervisors  
to furnish  
blank forms  
of state-  
ments, etc.

"I, ———, do swear that I am a resident of the county of (naming it); that the above list contains a full and correct statement of all property subject to taxation which I, or any firm of which I am a member, or any corporation, association, or company of which I am President, Cashier, Secretary, or managing agent, own, claim, possess, or control, and which is not already assessed this year, and that I have not, in any manner whatsoever, transferred or disposed of any property, or placed any property out of said county or my possession, for the purpose of avoiding any assessment upon the same, or of making this statement." (Approved March 24th, 1874. Effect immediately.)

**3632.** Every Assessor shall have power:

General  
powers of  
assessors.

1. To require any person found within such Assessor's respective county to make and subscribe an affidavit, giving his name and place of residence;

2. To subpoena and examine any person in relation to any statement furnished to him, or which discloses property which is assessable in his respective county; and he may exercise this power in any county where the persons whom he desires to examine may be found, but shall have no power to require such person to appear before him in any other county than that in which the subpoena is served upon them. Every person who shall refuse to furnish the statement hereinbefore required in this chapter, or to make and subscribe such affidavit respecting his name and place of residence, or to appear and testify when requested so to do by the Assessor, as above provided, shall, for each and every refusal, and as often as the same is repeated, forfeit to the people of the State the sum of one hundred dollars, in gold coin of the United States, to be recovered by action brought in their name by the respective Assessor







in any Police or Justice's Court. In case such affidavit shall show the residence of the person making the same, to be in any county other than that in which it is taken, or the statement shall disclose property in any county other than that in which it is made, the Assessor shall in the respective case, file the affidavit or statement in his office, and transmit a copy of the same, certified by him, to the Assessor of the county in which such residence or property is therein shown to be. One half of all moneys recovered by any Assessor under the provisions of this section must by him be paid into the treasury of his county, and the other half may be retained by the Assessor for his own use. (Approved March 24th, 1874. Effect immediately.)

2651. The form of the Assessment Book must be substantially as follows:

Form of  
assessment  
book.

Assessment Book of the property of — County, for the year 18—, assessed to all owners and claimants,  
known and unknown.

Remarks.....			
Poll tax.....			¢
Total tax.....			¢
Total value of all property after equalization by the State Board of Equalization. ....			¢
Total value of all property.....			¢
Amount of money.....			¢
Value of personal property.....			¢
Value of improvements on real estate assessed to persons other than the owners of the real estate. ....			¢
Value of improvements thereon.. ....			¢
Value of city and town lots.....			¢
Value of improvements thereon. ....			¢
Value of real estate other than city and town lots. ....			¢
Number of acres.....			
DESCRIPTION OF PROPERTY.	Real estate other than city and town lots.	Block.....	
		Lot.....	
		Fraction .....	
		Range, E. or W.....	
		Township, N. or S .....	
		Section.....	
		Subdivision of section .....	
Residence.....			
Taxpayers' names.....			
When tax paid. ....			

Personal property: (Here items may be enumerated in the space  
to column for number of acres.)





In the city and county of San Francisco the Form Book shall be such as may be directed by the State Board of Equalization. (Approved March 24th, 1874. Effect immediately.)

Although under the Revenue Act of 1861, the Assessor need not place the value of the land and the improvements thereon in separate columns, where both are assessed to the same person; yet, if he does so, the assessment is not radically defective, and does not show that the improvements were twice assessed. *People v. Culverwell*, 44 Cal. 620.

Rolling stock and improvements of Railroads, how assessed.

**3663.** Where the railroad of a railroad corporation lies in several counties, its rolling stock must be apportioned between them so that a portion thereof may be assessed in each county, and each county's portion must bear to the whole rolling stock the same ratio which the number of miles of the road in such county bears to the whole number of miles of such road lying in this State. The land occupied and claimed as the right of way, with the track and all the substructures and superstructures which support the same, must be assessed as a whole, and as real estate, without separating the same into lands and improvements, at a certain sum per mile. The improvements, other than the track and the substructures and superstructures which support the same, whether situated upon land occupied and claimed as the right of way, or on other lands, must be separately assessed. Water ditches constructed for mining, manufacturing, or irrigation purposes, and wagon or turnpike toll roads, with all improvements attached to such properties, must be listed by the Assessor as real estate, and as a whole, without separating the land and the improvements, either in the description or valuation of the same. (Approved March 30th, 1874.)

*AN ACT to regulate the assessment of Migratory Herds or Bands of Live Stock, and to provide for an Equitable Distribution of the Taxes derived therefrom.* [Approved March 16, 1874.]  
(Enacting Clause.)

Live stock, statement of owner under oath.

**SECTION 1.** Whenever the Assessor assesses any live stock, he must demand of the person who gives him a list thereof, a statement, under oath, showing: first, whether such stock, or any part thereof, will, dur-

ing the year for which such assessment is being made, be moved to another county for pasturage, and if such removal is to be made; second, the county to which such stock will be taken: and third, the number, kind, and value thereof; *provided*, that should such person, at the time of assessment, not have determined to remove such stock, and afterward should make such removal, it shall be lawful for him to make the statement to the Assessor of the county from which such stock was removed, as in this section provided, through the United States mail.

SEC. 2. The Assessor must fully note on his assessment roll, immediately below the description of the property listed to such person: first, the number and kind of stock to be removed; second, the name of the county to which such stock is to be removed; and third, the assessed value of such stock; and within ten days after making the assessment he must transmit, by mail, to the County Treasurer of the county to which such stock is to be taken, a copy of the statement provided for in section one of this Act; and the Treasurer must enter the same in a book to be kept by him for that purpose, which book shall be known as the assessment roll of migratory stock, and shall be open for inspection.

Description of property to be noted on assessment roll.

SEC. 3. The Collector must keep a separate account of all taxes collected upon the property mentioned in this Act, which account must include the names of the persons, description of the property, and the counties to which such stock has been driven, and at the time of his settlement, file such account with the Treasurer of his county; and the Treasurer must enter the same in a book to be kept by him for that purpose.

Collector to keep separate account.

SEC. 4. The Treasurer receiving moneys so collected, must set apart one half of the sum collected for county purposes, for the use, respectively, of the different counties to which the stock has been sent for pasturage.

Money collected, how set apart.

SEC. 5. On the first Monday in February of each year the Treasurer of each county to which any list provided for in section one has been sent, must make out a demand against the county from which the list came, for one half of the tax assessed for county purposes, against the property on said list, and must transmit the same to the County Treasurer of the county from which the list came, who must pay over to the Treasurer making the demand, all moneys received in the County Treasury, to the use of the county from which the demand came, and which had not been before paid over, accompanied with a duplicate of the statement filed by the Tax Collector.

Duty of Treasurer to demand half of tax assessed.

SEC. 6. The demand and payment provided for in the preceding section may be made through any regularly organized express company.

Demand and payment, how may be made.

SEC. 7. The Treasurer receiving money and statement, as provided in the preceding section, must pay the same into the County Treasury, and must mark the word "paid" on the assessment roll, opposite the name and description of property corresponding with the name and description of property included in such statement.

Payment to be noted on assessment roll.







Duty of assessor as to stock subsequently brought in.

SEC. 8. The Assessor must make examinations of the property listed in said roll, and must ascertain whether any live stock not on such roll has been sent or brought into his county for pasturage; and if he finds any such, must assess it at its full cash value; and in that case the fact that the same property has been assessed in another county for the same year, and that the taxes have been paid in such county, shall be no defense to any proceeding to recover the taxes assessed in the county in which such stock is found, unless it be proved that such person has complied with the provisions of section one of this Act, and that the Assessor has failed to make return thereof.

Penalty for failure to make, or for making false statement.

SEC. 9. Any person who drives, or causes to be driven, any live stock to another county for pasturage, and fails to make the statement provided for in section one, or who willfully fails to include in such statement the full number or value of stock so sent or driven, shall be liable to a penalty of five hundred dollars, to be recovered in the District Court of the county to which said stock is sent or driven; and such suit must be instituted by the District Attorney of said county in the name of the people of the State of California, upon the information of any responsible person; and one half of the penalty recovered must be paid to the person on whose information the suit was instituted.

Official neglect a misdemeanor.

SEC. 10. Any officer who shall fail, neglect, or refuse to perform the duties required of him by this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be fined a sum of not less than fifty nor more than five hundred dollars.

Acts to be printed and distributed.

SEC. 11. The State Board of Equalization must, immediately after the passage of this Act, have it printed, and transmit twenty copies thereof to each Assessor in the State.

SEC. 12. This Act shall take effect from and after its passage.

*AN ACT in relation to Taxation of Solvent Debts other than those secured by mortgage or other liens. [Approved March 28, 1874.]*

(Enacting Clause.)

Solvent debts, how assessed.

SECTION 1. Solvent debts other than those secured by mortgage or other lien, upon real or personal property, shall be subject to assessment for taxation only upon the excess in the cash value thereof, over and above the indebtedness of the owner, not secured by mortgage or lien upon real or personal property.

SEC. 2. This Act shall take effect and be in force from and after its passage.

3673. In order to give the Board of Equalization jurisdiction to increase the valuation of property beyond the amount at which it has been assessed, the filing of a complaint is necessary. *People v. Goldtree*, 44 Cal. 323. The complaint cannot be waived by appearance. *Id.* The Board, in passing on the question whether an assessment is too high or too low, acts in a judicial capacity, and its decision is an adjudication. *Id.* The Board of Supervisors, sitting as a Board of Equalization, has no power to cancel an assessment for taxes, placed by the Assessor on the Assessment Roll. *People v. Board of Supervisors*, 44 Cal. 613. A tax levied on the property of a given district, to pay for a

local improvement which is assessed upon the parcels of property in the district, in proportion to the benefits each parcel derives from the work, is unconstitutional. *People v. Whyler*, 41 Cal. 351. A charge imposed on all the property of a district, to be used in constructing levees to protect the district from overflow, is a tax, and not an assessment. *Id.*

**3680.** In all cases where the Board either adds to, or decreases, or alters the valuation of property made by the Assessor, the Clerk of the Board must note down and preserve, substantially, the evidence upon which such addition, decrease, or alteration was based. (Approved March 30th, 1874.)

Preservation of evidence taken before board.

**3693.** Where the property is found to be assessed above or below its full cash value, the Board must add to or deduct from the valuation of :

To equalize assessments, how.

First—The real estate;

Second—Improvements upon such real estate;

Third—The personal property, except money and solvent debts: such per centum, respectively, as is sufficient to raise or reduce it to the full cash value. In raising or reducing the valuation of personal property, the Board may confine such raising or reduction to one or more kinds of personal property, not exceeding six in number. (Approved March 24th, 1874. Effect immediately.)

A State Revenue Law is not unconstitutional because there is a want of uniformity between the particular laws prevailing in the several counties, with regard to the enforcement of the payment of delinquent taxes. *People v. C. P. R. R. Co.*, 43 Cal. 399.

**3696.** At the same time the Board must determine, and transmit to the Board of Supervisors of each county, the rate of the State tax to be levied and collected, which, after allowing twelve per cent. for delinquencies in, and costs of collection of taxes, must be sufficient to raise the specific amount of revenue directed to be raised by the Legislature for State purposes. (Approved March 24th, 1874. Effect immediately.)

Board to notify supervisors of amount of tax to be levied.





Board to  
notify  
Supervisors  
of amount  
of tax to be  
levied.

**3696.** At the same time the Board must determine and transmit to the Board of Supervisors of each county the rate of State Tax to be levied and collected, which, after allowing eighteen per cent for delinquencies in, and cost of collection of taxes, must be sufficient to raise the specific amount of revenue directed to be raised by the Legislature for State purposes. (Approved March 30th, 1874. Effect immediately.)

Amounts re-  
quired for  
several  
funds.

**3713.** The State Board of Equalization must, for State purposes, for the twenty-sixth and twenty-seventh fiscal years, fix such an ad valorem rate of taxation upon each one hundred dollars of taxable property of this State as will raise for the twenty-sixth fiscal year — One: For General Fund, \$1,788,000.00. Two: For the School Fund, \$1,110,000.00. Three: For the Interest and Sinking Fund, \$336,000.00; and for the twenty-seventh fiscal year — One: For the General Fund, \$1,600,000.00. Two: For the School Fund, \$1,130,000.00. Three: For the Interest and Sinking Fund, \$336,000.00. (Approved March 30th, 1874. Effect immediately.)

Taxes levied under Act, subsequently repealed. City of Oakland v. Whipple, 44 Cal. 303.

Tax on per-  
sonal prop-  
erty, a lien  
on realty.

**3717.** Every tax due upon personal property is a lien upon the real property of the owner thereof, from and after the time the same becomes delinquent. (Approved March 30th, 1874.)

Tax for  
School pur-  
poses.

**3719.** The State Board of Equalization must levy annually at the time other State taxes are levied a tax of such number of cents on each one hundred dollars value of taxable property in the State as will produce a net sum equal to the amount reported to them by the Controller as being necessary to be raised by an ad valorem tax for school purposes; and the assessment and collection of said tax shall be performed in the same manner and at the same time as other State taxes are assessed and collected. (Approved March 30th, 1874. Effect immediately.)

**3728.** The Auditor, in making a duplicate of the assessment book for the Tax Collector, must observe and follow such alterations as have been made by the Board of Supervisors, in the exercise of their powers in equalizing the assessed value of property, but he must disregard an order of the Board canceling an assessment, or any order of the Board by which it assumes an authority not conferred on it by law. *People v. Ashbury*, 44 Cal. 617.

**3730.** As soon as the Auditor receives from the State Board of Equalization a statement of the per centum, if any, to be added to or deducted from the valuation of the property of his county, he must add to or deduct from each assessment the required per centum on the valuation thereof, as the same has been equalized by the Board of Supervisors, and must enter the same in a column provided with a proper heading, in the assessment book, counting any fractional sum, when more than fifty cents, as one dollar, and omitting it when less than fifty cents, so that the value of any separate assessment shall contain no fraction of a dollar; but he shall, in all cases, disregard any action of the Board of Supervisors which is prohibited by section three thousand six hundred and thirty-three of this Code. (Approved March 24th, 1874. Effect immediately.)

Auditor to follow directions of State Board of Equalization in equalizing and assessing property.

**3732.** On or before the fourth Monday of October he must deliver a copy of the corrected assessment book, to be styled "Duplicate Assessment Book," to the Tax Collector, with an affidavit attached thereto, and by him subscribed, as follows:

Delivery of copy of corrected assessment book to collector.

"I, ———, Auditor of the County of ———, do swear that I received the assessment book of the taxable property of the county from the Clerk of the Board of Supervisors, with his affidavit thereto affixed, and that I have corrected it, and made it conform to the requirements of the State Board of Equalization; that I have reckoned the respective sums due as taxes; and have added up the columns of valuations, taxes, and acreage as required by law; and that the copy to which this affidavit is affixed is a full, true, and correct copy thereof, made in the manner prescribed by law." (Approved March 24th, 1874. Effect immediately.)







[Added sections, approved March 24th, 1874.]

Penalty for failure or neglect of County Auditor.

**3737.** If the County Auditor fails or neglects to perform the duties prescribed by sections three thousand seven hundred and twenty-eight and three thousand seven hundred and twenty-nine of the Political Code, he shall forfeit to the State five hundred dollars, to be recovered by action in the name of the State Board of Equalization. (Approved March 24th, 1874. Effect immediately.)

Duplicate assessment book may be dispensed with.

**3738.** The Board of Supervisors of any county may, in their discretion, dispense with the making or use of any Duplicate Assessment Book mentioned in any part of this Code; and in all cases where said Duplicate Assessment Book is referred to, it shall be lawful to use and consider the original Assessment Book in all the requirements of every part of this Code referring to the same, and all affidavits, or other statements in reference to said Duplicate Assessment Book, shall be substantially worded to conform to the use of the original Assessment Book. (Approved March 24th, 1874. Effect immediately.)

**3771.** Whether, under an assessment to several persons of a tract of land in *solido*, and as an entirety, an undivided interest can in any case be sold for a delinquent tax. Query? *People v. Shewmins*, 42 Cal. 123.

Owner of property may designate what portions to be sold first, etc.

**3773.** The owner or person in possession of any real estate offered for sale for taxes due thereon, may designate, in writing, to the Tax Collector, prior to the sale, what portion of the property he wishes sold, if less than the whole; but if the owner or the possessor does not, then the Collector may designate it, and the person who will take the least quantity of the land, or in case an undivided interest is assessed, then the smallest portion of the interest, and pay the taxes and costs due, including fifty cents to the Collector for the duplicate certificate of sale, is the purchaser. But in case there is no purchaser in good faith for the same, as provided in this chapter, on the first day that the property is of-

ferred for sale, then when the property is offered thereafter for sale, and there is no purchaser in good faith of the same, the whole amount of the property assessed shall be struck off to the people of the State as the purchaser, and the duplicate certificate delivered to the County Treasurer and filed by him in his office. No charge shall be made for the duplicate certificate when the State is a purchaser; and in such case the Tax Collector shall make an entry, "Sold to the State," on the Duplicate Assessment Book opposite the tax, and he shall be credited with the amount thereof in his settlement, made pursuant to sections three thousand seven hundred and ninety-seven, three thousand seven hundred and ninety-eight, and three thousand seven hundred and ninety-nine of this Code. (Approved March 24th, 1874. Effect immediately.)

3780. A redemption of the property sold may be made by the owner, or any party in interest, within six months from the date of purchase. (Approved March 24th, 1874. Effect immediately.)

Redemption, time for.

3781. Redemption must be made in gold or silver coin, and when made to the County Treasurer, he must credit the amount paid to the person named in the Collector's certificate, and pay it on demand to the person or his assignees. (Approved March 24th, 1874. Effect immediately.)

Coin.

3785. If the property is not redeemed within six months from the sale, the Collector, or his successor in office, must make to the purchaser or his assignee, a deed of the property, reciting in the deed substantially the matters contained in the certificate, and that no person redeemed the property during the time allowed by law for its redemption; *provided*, that in counties where no fee in making said deed is provided by law, the Collector shall be entitled to receive from the purchaser three dollars for making such deed. (Approved March 24th, 1874. Effect immediately.)

Deed to be given on failure to redeem.





Deed con-  
veys abso-  
lute title.

**3788.** The deed conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned by the United States or this State, in which case it is *prima facie* evidence of the right of cession.

Assessment  
book, dupli-  
cate assess-  
ment book,  
delinquent  
list, etc.

Prima facie  
evidence.

**3789.** The Assessment Book, Duplicate Assessment Book, or Delinquent List, or a copy thereof certified by the County Auditor, showing unpaid taxes against any person or property, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. (Approved March 24th, 1874. Effect immediately.)

[Added sections approved March 24th, 1874.]

Validity of  
sale.

**3811.** Whenever property is advertised for sale for the non-payment of delinquent taxes, and the assessment is valid in part and void for the excess, the sale shall not for that cause be deemed invalid, nor any grant subsequently made thereunder be held to be insufficient to pass a title to the grantee, unless the owner of the property, or his agent, shall, not less than six days before the time at which the property is advertised to be sold, deliver to the Tax Collector a protest, in writing, signed by the respective owner or agent, specifying the portion of the tax which he claims to be invalid, and the grounds upon which such claim is based. (Approved March 24th, 1874. Effect immediately.)

Protest.

Duty of tax  
collector on  
receiving  
protest.

**3812.** In case any owner of property, advertised to be sold for delinquent taxes, shall, at least six days before the time advertised for the sale to take place, deliver to the Tax Collector his protest in writing against such sale, signed by himself or his agent, claiming that the assessment is void in whole or in part—and if in part only, for what portion, and in either case specifying the grounds upon which such claim is founded—it shall be the duty of the Tax Collector, either:

First—To sell the property assessed for the whole amount appearing upon the Duplicate Assessment Book; or,

Second—Withdraw the property from sale, and report the case to the State Board of Equalization for its direction in the premises; and in such case the Board of Equalization may either direct the foreclosure of the lien of such tax by action, which proceeding is hereby authorized to be had, or direct the Collector to proceed with the sale. (Approved March 24th, 1874. Effect immediately.)

**3813.** In case property assessed for taxes is purchased by the State, pursuant to the provisions of section three thousand seven hundred and seventy-three of this Code, it shall be assessed the next year for taxes in the same manner as if it had not been so purchased. But it shall not be exposed for sale; and the sale thereof, under such assessment, shall be adjourned until the time of redemption, under the previous sale, shall have expired. (Approved March 24th, 1874. Effect immediately.)

Assessment  
and sale of  
property  
purchased  
by State.

**3814.** In case an assessment is made under the provisions of section three thousand eight hundred and thirteen of this Code, and the lands are not redeemed from a previous sale had under section three thousand seven hundred and seventy-three, as provided by law, no sale shall be had under the assessment authorized by said section three thousand eight hundred and thirteen, unless directed by the State Board of Equalization. (Approved March 24th, 1874. Effect immediately.)

No sale un-  
less direct-  
ed by board  
of equaliz-  
ation.

**3815.** In case property is sold to the State as purchaser, pursuant to section three thousand seven hundred and seventy-three of this Code, and is subsequently assessed pursuant to section three thousand eight hundred and sixteen of this Code, no person shall be permitted to redeem from such sale, except upon payment

Redemption  
of property  
sold to  
State.







also of the amount of such subsequent assessment, cost, fees and interest. (Approved March 24th, 1874. Effect immediately.)

Moneys received, how distributed.

**3816.** Whenever property sold to the State, pursuant to the provisions of this chapter, shall be redeemed, as herein provided, the moneys received on account of such redemption shall be distributed between the State Treasurer and the County Treasurer, and to the respective funds, in the same manner as if the same had been paid in the first instance to the Tax Collector. The County Treasurer shall keep an account of such taxes so represented by such sales, and shall, on the first Monday of March in each year, make a detailed report of each account, year for year, to the State Treasurer. Whenever the State shall receive from the Tax Collector any grant of property so sold for taxes, the same shall be recorded, at the request of the County Treasurer, free of charge by the County Recorder, and shall be immediately reported by the County Treasurer to the Board of Equalization. (Approved March 24th, 1874. Effect immediately.)

When taxes on personal property must be collected by assessor.

**3820.** The Assessor must collect the taxes on all personal property when, in his opinion, said taxes are not a lien upon real property sufficient to secure the payment of the taxes; *provided*, that in the city and county of San Francisco the Tax Collector shall collect such taxes at any time after the assessment. (Approved March 24th, 1874. Effect immediately.)

Amounts to collected, how determined.

**3823.** The Assessor and Collector are governed, as to the amount of taxes to be by him collected on personal property, by the State and County rate of the previous year. (Approved March 24th, 1874. Effect immediately.)

Compensation of assessor for collecting.

**3829.** For services rendered in the collection of taxes, the Assessor shall receive one per cent on the amount by him collected; *provided*, that all fees or commissions collected under this or any other Act by the

salaries officers in and for the city and county of San Francisco, shall be by said officers paid into the County Treasury for the use of said city and county. (Approved March 24th, 1874. Effect immediately.)

3839. Every male inhabitant of this State, over twenty-one and under sixty years of age, must annually pay a poll tax of two dollars; *provided*, the same be paid between the first Monday in March and the first Monday in July; but if not paid prior to the first Monday in July, then it shall be three dollars. (Approved March 30th, 1874. Effect immediately.)

Persons liable to poll tax.

3840. Poll tax must be collected by the Assessors between the first Monday in March and the second Monday in January of the ensuing year. (Approved March 30th, 1874. Effect immediately.)

Poll tax to be collected, when.

3841. The County Treasurer must, before the first Monday of March and the first Monday in July of each year, cause to be printed, respectively, of two and three dollars blank poll tax receipts, a sufficient number for the use of the Assessor. (Approved March 30th, 1874. Effect immediately.)

County Treasurer to have blank poll tax receipts printed.

3843. The Treasurer must, before the first Monday in March of each year:

Treasurers, duty in relation to poll tax blanks and receipt.

*First*—Number and sign the two-dollar blanks, and before the first Monday in July, number and sign the three-dollar blanks.

*Second*—At the time of signing, make an entry of the whole number thereof, and of the first and last number placed thereon, in a book by him kept for that purpose.

*Third*—Deliver all such blanks to the Auditor, and charge him therewith. (Approved March 30th, 1874. Effect immediately.)





Blanks to be delivered to assessor.

3845. He must, at any time after the first Monday in March and the first Monday in July, upon demand, deliver to the Assessor, in their order, the two and three dollar blanks, and charge him therewith. (Approved March 30th, 1874. Effect immediately.)

Poll tax may be collected by seizure, &c. of personal property.

3846. The Assessor must demand payment of poll tax of every person liable therefor, and on the neglect or refusal of such person to pay the same, he must collect by seizure and sale of any personal property owned by such person. (Approved March 30th, 1874. Effect immediately.)

Seizure and sale, how conducted.

3847. The sale may be made after three hours' verbal notice of time and place, and the provisions of sections thirty-seven hundred and ninety-one, thirty-seven hundred and ninety-three, thirty-seven hundred and ninety-four, thirty-seven hundred and ninety-five, and thirty-seven hundred and ninety-six, apply to such seizure and sale. (Approved March 30th, 1874. Effect immediately.)

Assessors, return of receipts to Auditor and yearly settlement.

3854. On the first Monday in July the Assessor must return to the Auditor all two-dollar blank poll-tax receipts received by him and not used, and pay to the Treasurer the total amount collected and not before paid in, less the amount of his fees, and the Auditor must deliver to him the three-dollar receipts; and on the second Monday in January of each year he must return to the Auditor all the three-dollar poll-tax receipts received by him and not used, and must make final settlement with the Auditor and Treasurer therefor. (Approved March 30th, 1874. Effect immediately.)

Assessors to keep roll of persons liable for poll tax.

3857. The Assessor must keep a roll of the names and local residence or place of business of all persons subject to or liable for poll tax, and if paid, date and amount of each payment, and if not paid, cause of non-payment; *provided*, that no person shall be returned as

delinquent on such roll unless a personal demand has been made upon him. (Approved March 30th, 1874. Effect immediately.)

**3858.** On the second Monday in January of each year the Assessor must deliver to the Auditor the roll so made up, and the Auditor must add to the total poll tax delinquent on such roll thirty-three and one third per centum additional, and without delay deliver such list to the Tax Collector, and charge the Collector therewith. (Approved March 30th, 1874. Effect immediately.)

Such roll to be returned to Auditor.

**3859** repealed. (Approved March 30th, 1874. Effect immediately.)

**3860.** If any person, assessed for a property tax, has not paid to the Assessor the poll tax due from him, or for which he is liable, it, with thirty-three and one third per cent. in addition thereto, constitutes a lien upon the property assessed to such person, to attach from the first Monday in March in each year, and must be collected in the same manner and at the same time as delinquent taxes are collected. (Approved March 30th, 1874. Effect immediately.)

Poll tax to be a lien on property, when.

**3862.** The Assessor, for services rendered in the collection of poll taxes, shall receive the sum of fifteen (15) per cent., and the Collector, for services rendered in the collection of poll taxes on the delinquent list (including the publication), shall receive the sum of twenty-five per cent. on all delinquent poll tax collected by him; *provided*, that in the city and county of San Francisco, all moneys collected under the provisions of this Act, by the Tax Collector, shall be paid into the public treasury, and belong thereto, as other public funds. (Approved March 30th, 1874. Effect immediately.)

Compensation allowed to assessor or for collecting such tax.







Time when  
certain  
Treasurers  
shall make  
settlement.

3866. The Treasurers of the counties of Amador, Alameda, Contra Costa, Calaveras, El Dorado, Nevada, Placer, Sierra, Solano, Yolo, San Francisco, Sacramento, San Joaquin, Santa Clara, Tuolumne and Yuba, respectively, must, between the fifteenth and thirtieth days of January, April, June and October of each year; and the County Treasurers of the counties of Humboldt, Klamath and Del Norte, must, between the fifteenth and thirtieth days of October and April in each year; and the County Treasurers of other counties of this State must, between the fifteenth and thirtieth days of January and June, respectively, in each year, proceed to the State Capitol and settle in full with the Controller of State, and pay over in cash to the Treasurer of State, all funds which have come into their hands as County Treasurers before the close of business at the end of the previous month. If sufficient property tax has not been reported by the Auditor to pay all charges and commissions allowed by law, the Controller shall defer the settlement until the next regular settlement. No mileage shall be allowed any Treasurer for any deferred settlement. (Approved March 30th, 1874. Effect immediately.

[Added Sections approved March 24, 1874.]

Action to re-  
cover prop-  
erty bought  
by State.

3897. Whenever the State shall become the purchaser of property sold for taxes, and shall receive a grant of the same, the State Board of Equalization may direct the District Attorney of the county, or the Attorney General, to bring an action to recover possession of the same. In case of judgment for the recovery of the same, or of any part thereof, the Board of Equalization may order the property so recovered to be sold by the County Treasurer, under such regulations and on such terms as they may prescribe, and a grant from the people of the State, executed by the County Treasurer to the purchaser, reciting the facts necessary to authorize such sale and conveyance, shall convey all the interest of the State in such property, and be *prima*

*facie* evidence of such facts. But no bid shall be received at such sale for less than twice the amount of all the taxes levied upon such property, and of all interest, costs, and expenses, up to the date of such sale. (Approved March 24th, 1874. Effect immediately.)

**3898.** In case sales are made under the provisions of the next preceding section, the proceeds of such sale shall be paid into the County Treasury. The Treasurer shall retain and distribute to the respective funds the portion belonging to the county, and shall pay the balance to the State Treasurer, who must place it in the General Fund. The attorney and counsel fees, costs, and expenses of the litigation for the recovery of the property, and of sales by the same, when audited by the Board of Examiners, must be paid out of the General Fund; *provided*, that the allowance in any one case shall not exceed the amount of said balance in such case. (Approved March 24th, 1874. Effect immediately.)

Proceeds of  
sale, where  
paid.

**3899.** The Controller may, at any time after a delinquent list has been delivered to a Collector, direct such Collector not to proceed in the collection of any tax on said list, amounting to three hundred dollars, further than to offer for sale but once any property upon which such tax is a lien. Upon such direction, the Collector, after offering the property for sale once, and there being no purchaser in good faith, must make out and deliver to the Controller a certified copy of the entries upon the delinquent list relative to such tax; and the Tax Collector, or the Controller, in case the Tax Collector refuses or neglects for fifteen days after being directed to bring suit for collection by the Controller, may proceed, by civil action in the proper Court, and in the name of the people of the State of California, to collect such tax and costs. (Approved March 24th, 1874. Effect immediately.)

Collection  
of taxes by  
action,  
when.





Complaint  
in action  
for taxes.

**3900.** In such action a complaint in the following form is sufficient:

(Title of Court.)

The people of the State of California

vs.

(Naming the defendant).

Plaintiff avers that the defendant is indebted to plaintiff in the sum of \$ —, State and county taxes for the fiscal year 18—, with five per cent added for the non-payment of such taxes, and — dollars, costs of collection, to date. Plaintiff demands judgment for said several sums, and prays that an attachment may issue in form as prescribed in section five hundred and forty of the Code of Civil Procedure.

(Signed by the Tax Collector, or Controller, or his attorney.)

Attachment.

On the filing of such complaint, the clerk must issue the writ of attachment prayed for, and such proceedings shall be had thereunder as under writs of attachment issued in civil actions. If, in such action, the plaintiff recover judgment, there shall be included in such judgment an attorney's fee of ten per cent. on the amount of the tax. In such action, the certified copy mentioned in the preceding section, made by the Collector and delivered to the Controller, is *prima facie* evidence that the person against whose property the tax was levied is indebted to the people of the State of California, in the amount of such tax. In case of payment of any such taxes after suit as above mentioned shall have been commenced, or after the recovery of judgment therefor, such payment must be made to the County Treasurer of the county in which such taxes are due, whereupon the Treasurer, after distributing to the several funds of the county the portions belonging to it, and paying to the Controller or his attorney the portion received as attorney's fees, and other costs, must pay the remainder to the State Treasurer at the times and in the manner prescribed by law for the payment of other State taxes. (Approved March 24th, 1874. Effect immediately.)

[Sec. 16 Of Amendatory Act, approved March 24, 1874.]

The State Board of Examiners are hereby directed to have five hundred copies of this Act printed in pamphlet form, and to transmit by express five copies thereof to the County Clerk of each county, for distribution to the revenue officers thereof.

**3921.** Beginning at the south corner of Plumas, in Sierra.  
the center of Slate Creek, as established in section three thousand nine hundred and twenty; thence easterly, on southern line of Plumas, as established in said section, to the range line between townships 21, north range, 13 east, and township 21, north, 14 east, Mt. Diablo meridian, thence north on said range line to the N. W. corner of township 21 north, 14 east, Mt. Diablo B. and M.; thence east on the line between townships 21 and 22 north Mt. Diablo base, to the State line forming the N. E. corner; thence south on said State line, to the N. E. corner of Nevada County, a point east of the source of south fork of the middle Yuba river; thence west to the source of, and down the south fork and middle Yuba river, to a point ten miles above the mouth of the latter; thence in a straight line northerly, to a point on the north fork of the Yuba river, known as Cuteye Foster's Bar; down said river, to the mouth of Big Cañon Creek; thence up said creek, four miles; thence in a straight line to the place of beginning. County seat, Downieville. (Approved March 16th, 1874. Effect immediately.)

**3922.** Beginning at the northwest corner of Yuba, Butte.  
in Feather River, at the mouth of Honcut Creek; thence northeasterly, up the Honcut Creek and the north or Natchez branch of the same, to its source, on line established by Surveyor General on survey of Westcott and Henning, eighteen hundred and fifty-nine; thence to the summit line of the ridge dividing the waters of the Yuba and Feather rivers; thence northeasterly, up said ridge, on line of said survey, to the third station tree westerly from the Woodville House; thence in a right







line fifty chains, more or less, to a station tree easterly from said house about twenty-six chains, said right line passing about three chains northerly of said house; thence northeasterly on said ridge and survey, to a point on line of said survey, a little westerly from the village of Strawberry Valley, which point is two thousand feet distant westerly, in right line from point of highest altitude on line of said survey east, and within three hundred yards of the village of Strawberry Valley; thence to the common corner of Plumas, Butte and Yuba, as established in section three thousand nine hundred and twenty; thence northwesterly, on southwesterly line of Plumas, as established in said section, to the most eastern southeastern corner of Tehama, as established in section three thousand nine hundred and fifteen, forming also the north corner of Butte; thence southwesterly, on the southeasterly line of Tehama, to the southeast corner of Tehama, at point of intersection of Rock Creek and southern line of township twenty-four north, Mount Diablo base; thence west on said township line to the Sacramento River; thence down said river, to the southwest corner of the Llano Seco grant; thence northeasterly along said grant line to its intersection with the northern boundary of township nineteen north; thence east to Watson's bridge on Butte Creek; thence on Colusa County, east line, down Butte Creek, to the northwest corner of Sutter County, as established in section three thousand nine hundred and twenty-six; thence east on north line of Sutter County to Feather River; thence down Feather River to place of beginning. County seat, Oroville. (Approved March 7th, 1874.)

Alameda.

**3953.** Beginning at the southwest corner, being the common corner, of San Mateo, Santa Clara and Alameda, as established in section three thousand nine hundred and fifty-one; thence easterly, on northerly line of Santa Clara, as established in section three thousand nine hundred and fifty-two, to common corner

of San Joaquin, Stanislaus, Santa Clara and Alameda, as established in section three thousand nine hundred and thirty-two; thence northwesterly, on the west line of San Joaquin County, to the slough known as the Pescadero, being the west channel or old San Joaquin River; thence westerly, in a straight line, until it strikes the dividing ridge, in the direction of the house of Joel Harlan, in Amador Valley; thence westerly along said ridge, crossing the gulch one half mile below Prince's Mill, thence to and running upon the dividing ridge between the redwoods known as the San Antonio and Prince's Woods; thence along said ridge to the head of the gulch or creek (Cerrito Creek) that divides the ranches of the Peraltas from the San Pablo Ranches; thence down said gulch to its mouth; thence southwesterly to the common corner of San Francisco, Contra Costa and Alameda, as established by section three thousand nine hundred and fifty; thence southerly to a point in the bay of San Francisco that would intersect a line parallel with the north line of the Central Pacific Railroad Company's wharf (as it now is) if extended westerly five hundred feet toward Yerba Buena Island; thence southeasterly in a line parallel with the east line of the city and county of San Francisco (which is the line now dividing said city and county from the county of Alameda) to its intersection with the south line of said city and county, as established in section three thousand nine hundred and fifty; thence easterly along said last mentioned line to the northeast corner of San Mateo; and thence southeasterly along the eastern line of San Mateo to the place of beginning. Horace A. Higley's survey map of Alameda County, 1857, are declared to contain a more particular description of the line out of the bay of San Francisco, county seat, city of Oakland. Provided that nothing in this Act contained shall be construed to place "Yerba Buena Island," or any part thereof, outside the limits of the city and county of San Francisco, but the same shall be deemed to be within said city and county, and the





westerly boundary line of the county of Alameda shall not come within two thousand and five hundred feet of any part of said island. (Approved March 30th, 1874. Effect in sixty days.)

Former surveys valid.

**3973.** All surveys and maps of boundary lines heretofore legally made and approved, are declared valid, and they are *prima facie* evidence of the establishment of such lines, except so far as they are inconsistent with the provisions of this Code.

**3976.** The fact that a party is an elector will not authorize him to apply, in his own name, for a writ of mandamus to compel the Board of Supervisors of a county to order an election to vote on the removal of the county seat. *Linden v. Alameda Co.*, 45 Cal. 6. See generally: *People v. Alameda Co.*, 45 Cal. 395.

Supervisors to order election.

**3977.** If the petition is signed by qualified electors of the county, whose names appear on the preceding assessment roll, equal in number to at least one half of all the votes cast in the county at the last preceding general election, the Board must, within five days after receiving such petition, order an election, naming the day on which it must be held, not more than sixty nor less than thirty-five days from the time of calling it, specifying its object.

Supervisors to order election.

**3977.** If the petition is signed by qualified electors of the county, equal in numbers to at least three fifths of all the votes cast in the county at the last preceding general election, the Board must, within five days after receiving such petition, order an election, naming the day on which it must be held, not more than sixty nor less than thirty-five days from the time of calling it, specifying its object. (Approved March 30th, 1874. Except San Mateo County, effect immediately.)

Notice of election.

**3978.** Notice of not less than twenty-five days must be given of the election, by posting notices thereof in each election precinct within the county.

**3981.** When the returns have been received and compared, and the results ascertained by the Board, if a majority of all the votes cast are in favor of any particular place, the Board must give notice of the result by posting notices thereof in all the election precincts in the county. Notice of result.

**3985.** When the county seat of a county has once been removed, it may be again removed from time to time, in the manner prescribed in this chapter; but no election must be ordered to effect any such subsequent removal, unless a petition praying an election is signed by two thirds of all the qualified electors whose names appear on the preceding assessment roll of the county, and are registered on the Great Register thereof; nor unless at such election, when ordered, a majority of all the votes cast are in favor of some other place as the county seat of the county; nor must two elections to effect such removal be held within any three consecutive years. Subsequent removal of county seat.

**3985.** When the county seat of a county has been once removed, it may be again removed, from time to time, in the manner prescribed by this chapter; but no election must be ordered to effect any such subsequent removal, unless a petition praying an election is signed by qualified electors of the county, equal in number to at least three fourths of all the votes cast at the next preceding election; nor unless, at such election, when ordered, a majority of all the votes cast are in favor of some other place as the county seat of the county; nor must two elections to effect such removal be held within any three years. (Approved March 30th, 1874. Except San Mateo County, effect immediately.) Same.

See generally: *People v. Alameda Co.*, 45 Cal. 395.

**4000.** The County of Sacramento is subject to the provisions of the Code respecting the government of counties. *People v. Sacramento Co.*, 45 Cal. 692.







Powers of  
Counties,  
how exercis-  
ed.

**4001.** Its powers can only be exercised by the Board of Supervisors, or by agents and officers, acting under their authority, or authority of law; *provided, however,* that whenever any Board of Supervisors shall, without authority of law, order any money paid as a salary, fees, or for other purposes, and such money shall have been actually paid; or whenever the County Clerk or County Auditor has drawn any warrant or warrants in his own favor, or in favor of any other person, without being authorized thereto by the Board of Supervisors, or by the law, and the same shall have been paid, the District Attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit in the name of the county, against such person or persons, to recover the money so paid, and twenty per cent. damage for the use thereof; and no order of the Board of Supervisors therefor shall be necessary in order to maintain such suit, and, *provided further,* that when the money has not been paid on such orders, it is hereby made the duty of the District Attorney of such county to commence suit in the name of the county for restraining the payment of the same, and no order of the Board of Supervisors therefor shall be necessary in order to maintain such suit. (Approved March 30th, 1874. Effect immediately.)

**4046.** The Board of Supervisors of a county have a right to decline the services of a District Attorney, when tendered in a civil action in which the county is interested, pending in another county, and have a right to employ other counsel. *Herrington v. Santa Clara Co.*, 44 Cal. 496. Control by San Francisco Supervisors over proceedings to change grade of streets. *People v. San Francisco*, 43 Cal. 91.

Contracts,  
how made.

**4047.** All contracts for:

1. County printing;
2. Books and stationery; and,
3. Supplies for county institutions; must be made with the lowest bidder; and after ten days public notice that such contract will be let, the bidding must be by sealed proposals.

[Added Section approved March 18, 1874.]

Powers of  
Board of  
Supervisors

**4047.** The Board of Supervisors shall have power to direct the Sheriff to attend in person, or by deputy, all the meetings of the Board, to preserve order, serve the notices or citations, as directed by the Board. And the Board shall have the same power to punish for contempt, by fine and imprisonment, as is now exercised and allowed by law to County Courts, to require obedience to their citations, and decorum in their meetings. (Approved March 18th, 1874. Effect immediately.)

**4079.** All public notices of proceedings of, or to be had before, the Board, not otherwise specially provided for, must be posted at the Court-house door, and in each election precinct in the county.

Notices,  
how given.

**4109.** All county and township officers, except judicial officers, Assessors, and Supervisors, must be elected at the general election held in September, eighteen hundred and seventy-three, and every two years thereafter, and hold office for two years from the first Monday of March next after their election; and the officers now holding shall continue in office until the first Monday in March, A. D. eighteen hundred and seventy-four, except Assessors, as hereinafter provided. Assessors must be elected at the general election held in September, eighteen hundred and seventy-five, and every four years thereafter, and hold office for four years from the first Monday of March next after their election, except that, in the city and county of San Francisco, the Assessor holds his office for the term of four years from the first Monday of December next after his election. Every Assessor now in office must hold his office, and exercise the duties thereof, until his successor is elected at the general election in September, eighteen hundred and seventy-five. The provision of this section, as far as it relates to the election and term of office of Assessors, applies to every county and city in this State; *provided*, that the term of office of no city and county officer of the city and county of San

County Officers, except, etc. when elected and term of office.





Francisco shall be in any wise affected by reason of this act; and, *provided further*, that nothing contained in this act shall operate to extend the term of office of the present Assessor of El Dorado, Alameda, and San Joaquin counties. (Approved December 22d, 1873. Effect immediately.)

Absence of  
county offi-  
cers from  
State.

**4120.** No county officer may absent himself from the State for more than thirty days. (Approved March 3d, 1874.)

Official  
bond class-  
ified and  
amounts  
therefor.

**4122.** County officers must execute official bonds corresponding to the class of the county of which they are officers, in the following amounts:

1. Sheriffs, first class, sixty thousand dollars; second class, twenty-five thousand dollars; third class, ten thousand dollars.

2. Clerks, first class, twenty-five thousand dollars; second class, fifteen thousand dollars; third class, six thousand dollars.

3. Auditors, first class, twenty thousand dollars; second class, ten thousand dollars; third class, two thousand dollars.

4. Treasurers, first class, one hundred thousand dollars; second class, eighty thousand dollars; third class, sixty thousand dollars.

5. Recorders, first class, ten thousand dollars; second class, five thousand dollars; third class, two thousand dollars.

6. District Attorneys, first class, fifteen thousand dollars; second class, ten thousand dollars; third class, two thousand dollars.

7. Assessors, first class, twenty thousand dollars; second class, ten thousand dollars; third class, three thousand dollars.

8. Tax Collectors, first class, fifty thousand dollars; second class, thirty thousand dollars; third class, fifteen thousand dollars.

9. Surveyors, first class, ten thousand dollars; sec-

ond class, five thousand dollars; third class, one thousand dollars.

10. School Superintendents, first class, five thousand dollars; second class, three thousand dollars; third class, one thousand dollars.

11. Coroners, first class, five thousand dollars; second class, two thousand dollars; third class, one thousand dollars.

12. Public administrators, first class, thirty thousand dollars; second class, twenty thousand dollars; third class, ten thousand dollars.

13. Supervisors, first class, fifteen thousand dollars; second class, ten thousand dollars; third class, two thousand dollars.

*AN ACT prescribing the Fees of Coroners and Elisors, and their mode of payment.* [Approved March 30, 1874.]

(Enacting Clause.)

SECTION 1. Whenever process is executed or any act performed by a Coroner or Elisor, in the cases provided by law in that behalf, such Coroner or Elisor shall be entitled to receive the same fees as the Sheriff would be entitled to receive for the same service, to be paid by the plaintiff in case of the summoning of jurors to complete the panel, and by the person or party requiring the service in all other cases in private actions. If rendered at the instance of the people, it shall be audited and paid as a county charge. [Effect immediately.]

Fees of Coroner and Elisor.

4178. The return of the Sheriff upon process or notices is *prima facie* evidence of the facts in such return stated.

Return prima facie evidence.

4187. Liability for trespass by wrongful seizure. *Goodyear v. Williston*, 42 Cal. 11.

4256. It is not the duty of the District Attorney to prosecute or defend civil actions in which the county is interested, which are pending in any other county than his own. *Herrington v. Santa Clara County*, 44 Cal. 496. Commissions when not allowed. *Id.*

4285. A Coroner holding an inquest, is in the performance of functions judicial in their character. *People v. Devine*, 44 Cal. 452.







[Added sections approved February 28, 1874.]

Costs of  
Criminal  
action re-  
moved.

**4345.** When a criminal action is removed before trial, the costs accruing upon such removal and trial shall be a charge against the county in which the indictment was found. (Approved February 28th, 1874. Effect immediately.)

Proceedings  
in collec-  
tion of such  
costs.

**4346.** The clerk of the county to which such action is removed, shall certify the amount of costs allowed and certified by the Court to the Auditor of his county, and such Auditor shall audit the same and draw his warrants therefor upon the Treasury of the county from which such action was removed; and such Auditor shall forward to said Treasurer and Auditor of the county from which said action was transferred, as aforesaid, a certified copy of the total amount of costs allowed by the Court, giving each item as certified to him by the County Clerk and the Court, and the Auditor receiving such certified copy of said costs allowed, shall enter the same in his books as a charge against the treasury of his county, and the County Treasurer of the county from which such action was removed, must immediately upon presentation pay said warrant out of the general fund of said county; or, if at the date of presentation there is not sufficient moneys in the said general fund to pay the same, he must indorse upon said warrant "Not paid for want of funds;" and said warrant must be registered, and shall draw interest at the same rate and be paid in the same manner as though it had been drawn by the Auditor of the county where the indictment was found. (Approved February 28th, 1874. Effect immediately.)

Provisions  
of Code, to  
what  
actions to  
apply.

**4347.** Sections forty-three hundred and forty-five and forty-three hundred and forty-six of this Code shall apply to all criminal actions which have been or may be removed for trial since the first day of January, eighteen hundred and seventy-three. (Approved February 28th, 1874. Effect immediately.)

**4356.** Municipal Corporations subordinate subdivisions of the State Government. *San Francisco v. Canavan*, 42 Cal. 541. Incorporated cities are mere governmental instruments for purposes of internal administration like counties created by law for the same purpose. *Winbigler v. City of Los Angeles*, 45 Cal. 36. Power of Legislature over Municipal Corporations. *San Francisco v. Canavan*, 42 Cal. 541. Over Municipal Funds. *Creighton v. San Francisco*, 42 Cal. 449. Over its affairs and property. *Sinton v. Ashbury*, 41 Cal. 525. Act authorizing a city to convey its lands. *San Diego v. S. D. & La. R. R. Co.*, 44 Cal. 106.

**4358 to 4365 inclusive, repealed.** (Approved March 28th, 1874.)

*AN ACT to enable the inhabitants of Territory adjacent to any city in this State to annex the same thereto, approved Feb. 1, 1872, is repealed.*  
[Approved March 28th, 1874. Effect Immediately.]

**4369.** The Common Council must, during the first Officers.  
year, by ordinance, fix the term of office of all elective officers and the time when they must be elected, and provide for the appointment of other necessary officers, including City Clerk, City Attorney, and Treasurer, and fix their terms and amount of their bonds.

**4370.** The elective officers of cities are: A Mayor, Officers of Cities.  
a Marshal, a Police Judge, Assessor and Collector of Taxes, and a Common Council consisting of not less than three members. They must be electors of the city, and qualify by taking the statutory oath of office, and, except the first officers elected, hold office for a term to be fixed by the Common Council, not exceeding two years.

**4374.** All city officers, before entering upon their Official oath and bond.  
duties, must take the oath of office. The Marshal, Attorney, Clerk, Assessor, Collector, and Treasurer must also give a bond, with sureties to be approved by the Mayor, payable to the corporation by its corporate name, in such penalty as may be prescribed by ordinance, conditioned for the faithful performance of the duties of their office, and a like bond may be required of any officer whose office is created by an ordinance.





Should the bond of any city officer become insufficient, he may be required to give additional bond ; and, upon his failure so to do, his office must be deemed vacant.

Powers of  
Mayor.

**4386.** The Mayor has power:

1. To nominate, and with the consent of the Common Council, to appoint all non-elective officers of the city provided for by the Common Council, including City Attorney, Secretary of the Council, and City Treasurer;

2. To suspend, and with the consent of the Common Council, to remove any non-elected officer, stating in the suspension or removal the cause thereof ;

3. To cause the ordinances of the city to be executed, and to supervise the discharge of official duty by all subordinate officers;

4. To communicate to the Common Council, at the beginning of every session, and oftener if deemed necessary, a statement of the affairs of the city, with such recommendations as he may deem proper;

5. To recommend to the Common Council such measures connected with the public health, cleanliness, and ornament of the city, and the improvement of the government and finances, as he deems expedient;

6. To approve all ordinances of the Common Council adopted by it, and in case the same do not meet his approbation, to return the same, with his objections, within five days after he receives the same.

**4387.** A Board of Supervisors in allowing or disallowing a claim, exercise judicial functions. *Tilden v. Sacramento County*, 41 Cal. 68.

**4408.** A municipal legislative body, if empowered by law to prohibit or suppress practices against good morals or public decency, may, by ordinance, punish the uttering of profane language, whether uttered frequently or only once by the same person. *Ex parte Delaney*, 43 Cal. 478. If the charter of a city requires any sale or lease of the real estate of such city to be made at public auction to the highest bidder, an ordinance of the Council of the City, making a lease of any portion of its realty to a corporation, upon the payment of a rent reserved, is void, and passes no title to the corporation. *S. F. & O. R. R. Co. v. Oakland*, 43 Cal. 503. An Act authorizing a municipal corporation to enter into a contract with a party to supply the city with water and

machinery, and connecting pipes for supplying the water, does not authorize the municipal authorities to purchase a site upon which to erect the water-works. *People v. McClintock*, 45 Cal. 11. The opening of streets in a city is a legislative municipal purpose. *Sinton v. Ashbury*, 41 Cal. 525.

**4457.** (N. S.) The provisions of this title and chapter are applicable to cases where the levees and other works of reclamation of any district are injured, or destroyed by mobs or riots; and the actions brought for damages therefor must be prosecuted by the Attorney-General of the State in the name of the people of the State of California; and the amount recovered in such actions must be paid to the Treasurer of the county, who must place the same to the credit of the district. Application of this title.

All provisions of law inconsistent with the provisions of this Act are hereby repealed; but no rights acquired, or proceedings taken, under the provisions repealed, shall be impaired, or in any manner affected by this repeal; and whenever a limitation or period of time prescribed by such repealed provisions for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Act takes effect, and the same or any other limitation is prescribed by this Act, the time which shall have run when this Act takes effect, shall be deemed part of the time prescribed by this Act. Repealing clause.

With relation to the laws passed at the present session of the Legislature, this Act must be construed as though it had been passed on the first day of the present session, and, if any of the provisions of this Act contravene or are inconsistent with the provisions of any law passed at the present session of the Legislature, then the provisions of such law must prevail. [Takes effect first Monday in July, 1874.] Act, how construed.







*AN ACT legalizing the State Tax and Assessments in the several counties, in eighteen hundred and seventy-two and eighteen hundred and seventy-three. [Approved March 28, 1874.]*

(Enacting Clause.)

Assess-  
ments of  
1872 and  
1873 legal-  
ized.

SECTION 1. No irregularity, informality, or error in the description of the property, or other informality in the assessments for State, county, or municipal taxes made by the County, District, or City Assessors, in the several counties of this State, in the years eighteen hundred and seventy-two and eighteen hundred and seventy-three, if it can be ascertained by competent evidence what is intended, shall invalidate such assessments; but the same, notwithstanding such informality, irregularity, or errors, are hereby made good and valid; and the acts of the State Board of Equalization, in fixing the rate of tax to be levied for State purposes in said years, are hereby ratified and confirmed.

SEC. 2. This Act shall take effect immediately.

*AN ACT to Equalize and confirm the Levy, Equalization, Assessment Roll, Publication, and sale of Real Estate, for the non-payment of Taxes. [Approved March 30, 1874.]*

(Enacting Clause.)

Delinquent  
Taxes, sales  
for.

SECTION 1. The levy, equalization, assessment roll, publication, and sale of delinquent taxes for the fiscal year eighteen hundred and seventy-three and eighteen hundred and seventy-four, is hereby legalized and confirmed, and shall have the same force and effect as though it had been made as provided by law.

SEC. 2. In case different remedies are given for the enforcement or collection of taxes in the same or different statutes, such remedies must be regarded as cumulative, and either of the remedies given may be pursued, and more than one remedy may be pursued at the same time.

SEC. 3. This Act shall take effect on after its passage.

*AN ACT levying a Tax for State Purposes, for the twenty-fourth and twenty-fifth fiscal years, and to provide for the enforcement thereof. [Approved March 28, 1874.]*

(Enacting Clause.)

Tax for  
Twenty-  
fourth fiscal  
year.

SECTION 1. There is hereby levied, for State purposes, for the twenty-fourth fiscal year, a tax of fifty cents upon each one hundred dollars of property subject to taxation for that year within this State.

Tax for  
Twenty-  
fifth fiscal  
year.

SEC. 2. There is hereby levied, for State purposes, for the twenty-fifth fiscal year, a tax of fifty cents upon each one hundred dollars of property subject to taxation for that year within this State.

Effect of  
levy.

SEC. 3. The levies of taxes in the preceding sections mentioned shall have the same force and effect as if they had been levied by a statute passed and in force before the commencement of each of said fiscal years.

Assessment  
books valid-  
ated.

SEC. 4. The assessment books of the various counties of the State for each of said years, as delivered by the Clerks of the Board of Supervisors to the Auditors, are hereby validated in every respect, and no action whatever, of any Board of Supervisors, or of Equalization, had

## POLITICAL CODE, 1873-4.

upon or in relation to anything thereon since said books were so delivered (except the acts of the various Boards of Supervisors in levying taxes for county purposes), shall be of any force or effect.

SEC. 5. Each Tax Collector in this State must, within twenty days after the passage of this Act, make with the Auditor of his county a final settlement in relation to his collections for the present fiscal year, and must at the same time return his delinquent list to the Auditor.

Tax Collectors to make final settlements, when.

SEC. 6. Every voluntary payment heretofore made, upon any assessment, for either of said fiscal years, shall have the same force and effect as if made since the passage of this Act, and the word "Paid," marked upon the "Assessment Book," or any "Delinquent List," for either of said years, shall be *prima facie* evidence that the taxes by this Act levied have been paid upon the property against which said word is marked.

Payments made, validated.

SEC. 7. Within forty days after the passage of this Act, the Auditor of each county in this State must make a "Duplicate Assessment Book" for each of said fiscal years; which duplicate must be a copy of the assessment book for the year, as he received it from the Clerk of the Board of Supervisors, except that he must not enter thereon any assessments, or taxes, marked on the assessment book "Paid." On said duplicate he must add up the valuations, and enter the total valuation of the property. He must then enter, in a separate money column, in the duplicate assessment book, the respective sums, in dollars and cents (rejecting the fractions of a cent), to be paid as a State tax on each piece of property, at the rate of fifty cents on each one hundred dollars of its value, as fixed in said book, and must then foot up the column, showing the total amount of such taxes.

Duplicate assessment books to be made.

SEC. 8. Within forty-five days after the passage of this Act, the Auditor of each county must deliver both of said "duplicate assessment books" to the Tax Collector of his county, with a certificate attached that each is correctly made, and must take the Collector's receipt therefor, and must charge the Tax Collector with the full amounts of the taxes thereon, and forthwith transmit, by mail, to the Controller, a statement of the amount so charged.

Duplicate assessment book to be delivered to Collector.

SEC. 9. Within ten days after the receipt of said books, the Tax Collector must publish a notice that the taxes entered on said books will become delinquent on the first Monday in July, eighteen hundred and seventy-four, and that, unless paid prior thereto, twenty-five per cent. will be added to the amount thereof.

Notice that taxes will become delinquent, when.

SEC. 10. Sections three thousand seven hundred and forty-nine, three thousand seven hundred and fifty, three thousand seven hundred and fifty-one, three thousand seven hundred and fifty-two, three thousand seven hundred and fifty-three, three thousand seven hundred and fifty-four, and three thousand seven hundred and fifty-five of the Political Code, are hereby made applicable to proceedings under this Act.

Sections of Code applicable.

SEC. 11. On the second Monday in July, eighteen hundred and seventy-four, the Tax Collector of each county must attend at the office of the Auditor, with both of said duplicates, and carefully compare

Duplicates to be compared with originals and marked





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them with the assessment books, and every item marked "Paid" on the duplicate, must be marked "State tax paid" opposite the assessment on the original.

Delinquent list to be delivered to Auditor.

SEC. 12. The Tax Collector must, at the same time, deliver to the Auditor, certified as correct, a complete "delinquent list" for each of said fiscal years. The lists must be as prescribed in section three thousand seven hundred and sixty of the Political Code, and such proceedings must be had as are required by section three thousand seven hundred and sixty-one of said Code.

To be transmitted to Collector.

SEC. 13. The Auditor must at once transmit said delinquent list to the Controller of State.

Controller must enforce collection of delinquent taxes.

SEC. 14. The Controller, in the name of the people of the State of California, must at once enforce the collection of the taxes delinquent, the twenty-five per cent. added, and the interest, in his discretion, either by civil actions, as such actions are prosecuted upon express contracts for the direct payment of money made and payable in this State, or by actions to enforce the lien of the assessment, as mortgage liens are enforced; and, except as otherwise expressly provided in this Act, the Code of Civil Procedure is hereby made applicable to such actions.

Certified copy as prima facie evidence.

SEC. 15. In every such action the delinquent list, or a copy thereof, certified by the Controller, shall be *prima facie* evidence of the validity of the assessment, that the amount therein stated is due, and of every fact necessary to maintain the action.

Money collected by action, how disposed of.

SEC. 16. Whenever any money is collected in any such action, it shall be paid into Court, and of the amount of the taxes and percentage, ten per cent. shall be paid to the attorney employed by the Controller to prosecute the action, and the balance, with the interest, shall be paid to the Tax Collector of the proper county. The costs shall be paid to the officers who rendered the services for which such costs were taxed.

Receipt to be taken by Clerk.

SEC. 17. Whenever the clerk pays over to a Tax Collector any moneys so collected, he must take a receipt therefor, in duplicate, file one in the papers relating to the case, and transmit the other to the Auditor of the county of which the collector to whom the money was paid is an officer; and the Auditor must require the Collector, at his next monthly settlement, to pay said money into the County Treasury.

Sections of Code applicable to construction of Act.

SEC. 18. Sections four, three thousand seven hundred and eighty-nine, three thousand eight hundred and three, three thousand eight hundred and eighty-five, and three thousand eight hundred and eighty-eight of the Political Code, are made applicable to the construction of this Act, and to proceedings had under it.

No limitation to actions under this act.

SEC. 19. There shall be no limitation as to the time in which actions, under this Act, may be commenced.

Compensation of Auditor.

SEC. 20. The Auditors of the respective counties shall receive, to their own use, for services performed under this Act, a reasonable compensation, to be audited and allowed by the Board of Examiners, and paid out of the State Treasury.

Fees of Officers to be taxed as costs.

SEC. 21. The State shall not be responsible to, or pay any county officer, except Auditor, for any services performed under this Act; but

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the fees for such services shall be taxed with the other costs in the action, and shall, when collected, be paid to the officers for their own use.

SEC. 22. This Act shall be in force from and after its passage.

*AN ACT to Define the Senatorial and Assembly Districts of this State, and to Apportion the Representation thereof. [Approved March 16, 1874.]*  
(Enacting Clause.)

SECTION 1. The counties of San Diego and San Bernardino shall be the First Senatorial District, and shall elect one Senator; and each of said counties shall elect one member of the Assembly.

First Senatorial district.

SEC. 2. The county of Los Angeles shall be the Second Senatorial District, and shall elect one Senator and two members of the Assembly.

Second Senatorial district.

SEC. 3. The counties of Ventura, Santa Barbara and San Luis Obispo, shall be the Third Senatorial District, and shall elect one Senator; Ventura and Santa Barbara, jointly, shall elect one member of the Assembly, and San Luis Obispo shall elect one member of the Assembly.

Third Senatorial district.

SEC. 4. The counties of Tulare, Inyo, Fresno, Mono and Kern, shall be the Fourth Senatorial District, and shall elect one Senator; Fresno shall elect one member of the Assembly; Tulare and Kern shall elect jointly one member of the Assembly; and Mono and Inyo shall elect jointly one member of the Assembly.

Fourth Senatorial district.

SEC. 5. The counties of Mariposa, Merced, and Stanislaus, shall be the Fifth Senatorial District, and shall elect one Senator; Mariposa and Merced shall jointly elect one member of the Assembly, and Stanislaus shall elect one member of the Assembly.

Fifth Senatorial district.

SEC. 6. The counties of Santa Cruz, Monterey and San Benito shall be the Sixth Senatorial District, and shall elect jointly one Senator; and each of said counties shall elect one member of the Assembly.

Sixth Senatorial district.

SEC. 7. The county of Santa Clara shall be the Seventh Senatorial District, and shall elect two Senators and three members of the Assembly.

Seventh Senatorial district.

SEC. 8. The city and county of San Francisco, and the county of San Mateo, shall be the Eighth Senatorial District, and shall elect one Senator. The county of San Mateo shall elect one member of the Assembly.

Eighth Senatorial district.

SEC. 9. That portion of the city and county of San Francisco bounded and described as follows, to wit: Commencing at a point where the southerly line of United States military reservation known as the "Presidio Reservation" intersects with the waters of the Pacific Ocean; thence meandering along the waters of said ocean, and the waters of the bay of San Francisco, northerly, easterly and southerly, to the point where Washington street intersects with said bay; thence westerly along said Washington street to its intersection with First Avenue; thence northerly along said avenue to its intersection with the southerly boundary line of the said "Presidio Reservation;" thence westerly and along the southerly boundary line of said "Presidio Reservation" to its intersection with the Pacific Ocean, and the point of

Ninth Senatorial district.







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beginning shall be the Ninth Senatorial District, and shall elect two Senators and four members of the Assembly.

Tenth Senatorial district.

SEC. 10. That portion of the city and county of San Francisco bounded and described as follows, to wit: Commencing at a point where the southerly boundary line of the "Presidio Reservation" intersects with the waters of the Pacific Ocean; thence easterly and along the southerly boundary line of said "Presidio Reservation" to the point where First Avenue intersects with said boundary line; thence southerly along said First Avenue to the point where Washington street intersects with said First Avenue; thence easterly along said Washington street to its intersection with the waters of the bay of San Francisco; thence southerly along the line of said bay to the point of intersection of Market street with said bay; thence westerly along said Market street to the point where Geary street intersects with said Market street; thence westerly along said Geary street to where it connects with the Point Lobos Toll Road; thence along said Point Lobos Toll Road, and said Toll Road, produced in a direct line to the Pacific Ocean; thence northerly along said ocean to the point of beginning, shall be the Tenth Senatorial District, and shall elect two Senators and four members of the Assembly.

Eleventh Senatorial district.

SEC. 11. That portion of the city and county of San Francisco, bounded and described as follows, to-wit: Commencing at a point on the line of Market street, where Fourth street intersects with said Market street; thence easterly and along said Market street to the waters of the Bay of San Francisco; thence southerly and southwesterly along the line of the waters of said bay, to a point where Fourth street intersects with said bay; thence northerly along the line of said Fourth street to the point of beginning, shall be the Eleventh Senatorial District, and shall elect two Senators and four members of the Assembly.

Twelfth Senatorial district.

SEC. 12. That portion of the city and county of San Francisco, bounded and described as follows, to-wit: Commencing at the intersection of Larkin and Geary streets, and running thence easterly along said Geary street to its intersection with Market street; thence southwesterly along the line of said Market street, to the point of intersection of Fourth street with said Market street; thence southerly along said Fourth street to the point of its intersection with Channel street; thence southwesterly along said Channel street to the point of its intersection with Eighth street; thence northerly along said Eighth street to the point of its intersection with Market street; thence southwesterly along said Market street to the point of the intersection of Larkin street with said Market street; thence northerly along said Larkin street to the point of beginning, shall be the Twelfth Senatorial District, and shall elect two Senators and four members of the Assembly.

Thirteenth Senatorial district.

SEC. 13. That part of the city and county of San Francisco, bounded and described as follows, to-wit: Commencing at a point where the Point Lobos Toll Road, produced in a direct line westerly, intersects with the waters of the Pacific Ocean, and running thence easterly along said Point Lobos Toll Road to the point of its connec-

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tion with Geary street; thence along said Geary street, easterly, to its intersection with Larkin street; thence southerly along said Larkin street to the point of its intersection with Market street; thence northeasterly along said Market street to the point where Eighth street intersects with said Market street; thence southeasterly along said Eighth street to its intersection with Channel street; thence northeasterly along said Channel street to the point of its intersection with Fourth street; thence southeasterly along said Fourth street to the point of its intersection with the Bay of San Francisco; thence southerly along the line of the waters of said bay, to the point of intersection of the boundary line between the city and county of San Francisco and the county of San Mateo, with the waters of said bay; thence westerly along said boundary line to the point of its intersection with the Pacific Ocean; thence northerly along the line of said Ocean to the point of beginning, shall be the Thirteenth Senatorial District, and shall elect two Senators and four members of the Assembly.

SEC. 14. The county of Alameda shall be the Fourteenth Senatorial District, and shall have two Senators and three members of the Assembly. Fourteenth Senatorial district.

SEC. 15. The counties of Contra Costa and Marin shall be the Fifteenth Senatorial District, and shall elect one Senator, and each of said counties shall elect one member of the Assembly. Fifteenth Senatorial district.

SEC. 16. The counties of San Joaquin and Amador shall be the Sixteenth Senatorial District; San Joaquin shall elect one Senator, and, jointly, with Amador, shall elect one Senator; San Joaquin shall elect three members of the Assembly, and Amador shall elect two members of the Assembly. Sixteenth Senatorial district.

SEC. 17. The counties of Tuolumne and Calaveras shall be the Seventeenth Senatorial District, and shall elect one Senator, and each of said counties shall elect one member of the Assembly. Seventeenth Senatorial district.

SEC. 18. The county of Sacramento shall be the Eighteenth Senatorial District, and shall elect two Senators and three members of the Assembly. Eighteenth Senatorial district.

SEC. 19. The counties of Solano and Yolo shall be the Nineteenth Senatorial District; Solano shall elect one Senator and two members of the Assembly; Yolo shall elect one member of the Assembly, and, jointly with Solano, shall elect one Senator. Nineteenth Senatorial district.

SEC. 20. The counties of Napa, Lake, and Sonoma, shall constitute the Twentieth Senatorial District, and shall elect one Senator; and Napa and Lake counties shall each elect one member of the Assembly. Twentieth Senatorial district.

SEC. 21. The county of Sonoma shall be the Twenty-first Senatorial District, and shall elect one Senator and three members of the Assembly. Twenty-first Senatorial district.

SEC. 22. The county of Placer shall be the Twenty-second Senatorial District, and shall elect one Senator and one member of the Assembly. Twenty-second Senatorial district.

SEC. 23. The counties of El Dorado and Alpine shall be the Twenty-third Senatorial District, and shall elect one Senator; the county of El Dorado shall elect one member of the Assembly, and the Twenty-third Senatorial district.





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counties of El Dorado and Alpine shall jointly elect one member of the Assembly.

Twenty-fourth Senatorial district.

SEC. 24. The counties of Nevada and Sierra shall be the Twenty-fourth Senatorial District; Nevada shall elect one Senator and three members of the Assembly; Sierra shall elect one member of the Assembly and one Senator jointly with Nevada.

Twenty-fifth Senatorial district.

SEC. 25. The counties of Yuba and Sutter shall be the Twenty-fifth Senatorial District, and shall elect one Senator; Yuba shall elect two members of the Assembly, and Sutter shall elect one member of the Assembly.

Twenty-sixth Senatorial district.

SEC. 26. The counties of Butte, Plumas, and Lassen, shall be the Twenty-sixth Senatorial District, and shall elect one Senator; Butte shall elect two members of the Assembly, and Plumas and Lassen shall jointly elect one member of the Assembly.

Twenty-seventh Senatorial district.

SEC. 27. The counties of Mendocino, Humboldt, Klamath, and Del Norte, shall be the Twenty-seventh Senatorial District, and shall elect one Senator; Humboldt and Mendocino shall each elect one member of the Assembly, and Klamath and Del Norte shall jointly elect one member of the Assembly.

Twenty-eighth Senatorial district.

SEC. 28. The counties of Siskiyou, Modoc, Trinity, and Shasta shall be the Twenty-eighth Senatorial District, and shall elect, jointly, one Senator; Siskiyou and Modoc shall elect, jointly, one member of the Assembly; Trinity and Shasta shall elect, jointly, one member of the Assembly.

Twenty-ninth Senatorial district.

SEC. 29. The counties of Colusa and Tehama shall be the Twenty-ninth Senatorial District, and shall elect one Senator and one member of the Assembly.

Election and number of Senators.

SEC. 30. At the general election to be held in the year eighteen hundred and seventy-five, and every four years thereafter, there shall be elected in the First, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Fourteenth, Fifteenth, Sixteenth, Eighteenth, Nineteenth, Twentieth, Twenty-seventh, and Twenty-ninth Districts, one Senator each, and in the Twelfth and Thirteenth Districts, two Senators each.

Election and number of Senators.

SEC. 31. At the general election to be held in the year eighteen hundred and seventy-seven, and every four years thereafter, there shall be elected in the Second, Third, Fourth, Seventh, Ninth, Tenth, Eleventh, Fourteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twenty-first, Twenty-second, Twenty-third, Twenty-fifth, Twenty-sixth, and Twenty-eighth Districts, one Senator each, and in the Twenty-fourth District, two Senators.

Election of members of assembly.

SEC. 32. At the general election to be held in the year eighteen hundred and seventy-five, and every two years thereafter, members of the Assembly shall be elected in the several districts and counties of the State as is provided in this Act.

SEC. 33. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

AMENDMENTS  
TO THE  
PENAL CODE,

ENACTED AT THE TWENTIETH LEGISLATIVE  
SESSION, 1873-4.

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UNLESS OTHERWISE STATED AT THE CLOSE OF THE SECTION, THESE  
AMENDMENTS TAKE EFFECT JULY 1st, 1874.

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4. The rule of the Common Law, that penal statutes should receive a strict construction in favor of him upon whom a penalty was to be inflicted, has been abrogated by the Code, which has constituted itself, in this respect, its own interpreter. *Ex parte Gutierrez*, 45 Cal. 429.

7. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word person includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration; and every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose;" signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness. The following words, also,

Words what  
included  
in defini-  
tion.







Code signi-  
fication of  
words.

have in this Code the signification attached to them in this section, unless otherwise apparent from the context:

Willfully.

1. The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage;

Neglect,  
negligence,  
etc.

2. The words "neglect," "negligence," "negligent," and "negligently," import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns:

Corruptly.

3. The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person;

Malice,  
maliciously

4. The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law;

Knowingly.

5. The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this Code. It does not require any knowledge of the unlawfulness of such act or omission;

Bribe.

6. The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity;

Vessel.

7. The word "vessel," when used with reference to shipping, includes ships of all kinds, steamboats, canals, boats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons;

Peace Offi-  
cer.

8. The words "peace officer" signify any one of the

officers mentioned in section eight hundred and seventeen of this Code;

9. The word "magistrate" signifies any one of the officers mentioned in section eight hundred and eight of this Code; Magistrate.

10. The word "property" includes both real and personal property; Property.

11. The words "real property" are coextensive with lands, tenements, and hereditaments; Real Property.

12. The words "personal property" include money, goods, chattels, things in action, and evidences of debt. Personal Property.

13. The word "month" means a calendar month, unless otherwise expressed; Month.

14. The word "will" includes codicils; Will.

15. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a Court or judicial officer, and the word "process" a writ or summons issued in the course of judicial proceedings; Writ.

16. Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning; Technical words, etc.

17. Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority; Words giving jointly authority.

18. When the seal of a Court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, or upon any substance attached to the paper capable of receiving a visible impression. The seal of a private person may be made in like manner, or by the scroll of a pen, or by writing the word "seal" against his name; Seal, what it includes.





State, what  
it includes.

19. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories, and the words "United States" may include the District and Territories.

Crimes  
defined.

17. A felony is a crime which is punishable with death or by imprisonment in the State Prison. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the State Prison is also punishable by fine or imprisonment in a county jail, in the discretion of the Court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the State Prison. (Approved March 7th, 1874. Sixty days.)

Who are  
capable of  
committing  
crimes.

26. All persons are capable of committing crimes except those belonging to the following classes:

1. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness;
2. Idiots;
3. Lunatics and insane persons;
4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent;
5. Persons who committed the act charged without being conscious thereof;
6. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence;
7. Married women (except for felonies) acting under the threats, command, or coercion of their husbands;
8. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

31. If there is a conspiracy between two persons who fired to commit a felony, it is immaterial whether the defendant on trial fired the fatal shot, or the other person, as both are equally guilty. *People v. Woody*, 45 Cal. 289.

32. ACCESSORIES.—Under an indictment which charges a defendant as principal, he cannot be found guilty if the evidence shows him to be an accessory before the fact. *People v. McGungell*, 41 Cal. 429.

43. Every person who, after being required by the Board of Judges at any election, refuses to be sworn, or, being sworn, refuses to answer any pertinent question, propounded by such Board, touching the right of another to vote, is guilty of a misdemeanor.

Refusal to be sworn by, or to answer questions of Board of Judges of Election, a misdemeanor.

52. Every person who aids or abets in the commission of any of the offenses mentioned in the four preceding sections, is punishable by imprisonment in the County Jail for the period of six months, or in the State Prison not exceeding two years.

Persons aiding and abetting, punishment of.

62. Every person who prints any ticket not in conformity with section one thousand one hundred and ninety-one of the Political Code, or who circulates or gives to another any ticket, knowing at the time that such ticket does not conform to the provisions of section one thousand one hundred and ninety-one of the Political Code, is guilty of a misdemeanor. [Approved March 25, 1874.]

Printing or circulating tickets not in conformity with the election laws.

65. Every person who exercises any function of a public office without taking the oath of office, or without giving the required bond, is guilty of a misdemeanor.

Acting in a public capacity without having qualified.

70. Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

Extortion.

89. Every person who obtains or seeks to obtain money, or other thing of value, from another person upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote

Obtaining money or property to influence vote of legislature, a felony.







Evidence  
admissible  
on trial.

or legislative matter, is guilty of a felony. If, upon the trial of an indictment found under the provisions of this section, the accused is examined as a witness in his own behalf, evidence may then be given that he has committed acts in violation of the provisions of this section other than the act charged in the indictment. Upon the trial, no person, otherwise competent as a witness, shall be disqualified from testifying as such concerning the offense charged on the ground that such testimony may criminate himself; but no prosecution can afterward be had against him for any offense concerning which he testified. [Approved March 30, 1874. Effect immediately.

Improper  
attempts to  
influence  
jurors, ref-  
erees, etc.

95. Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator, or umpire, or appointed a referee, in respect to his verdict in, or decision of any cause, or proceeding, pending, or about to be brought before him, either:

1. By means of any communication, oral or written, had with him except in the regular course of proceedings;

2. By means of any book, paper, or instrument exhibited, otherwise than in the regular course of proceedings;

3. By means of any threat, intimidation, persuasion, or entreaty; or,

4. By means of any promise, or assurance of any pecuniary or other advantage;

—Is punishable by fine not exceeding five thousand dollars, or by imprisonment in the State Prison not exceeding five years.

Misconduct  
of jurors,  
referees, etc

96. Every juror, or person drawn or summoned as a juror, or chosen arbitrator or umpire, or appointed referee, who either:

1. Makes any promise or agreement to give a verdict or decision for or against any party; or,

2. Willfully and corruptly permits any communica-

tion to be made to him, or receives any book, paper, instrument, or information relating to any cause or matter pending before him, except according to the regular course of proceedings;

—Is punishable by fine not exceeding five thousand dollars, or by imprisonment in the State Prison not exceeding five years.

**116.** Every person who adds any names to the list of persons selected to serve as jurors for the county, either by placing the same in the jury box, or otherwise, or extracts any name therefrom, or destroys the jury box or any of the pieces of paper containing the names of jurors, or mutilates or defaces such names so that the same cannot be read, or changes such names on the pieces of paper, except in cases allowed by law, is guilty of a felony.

Adding  
names, etc.,  
to jury lists.

**137.** Every person who gives or offers, or promises to give, to any witness, or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any person give false or withhold true testimony, is guilty of a felony.

Bribing  
witnesses.

**138.** Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of a felony.

Witness re-  
ceiving or  
offering to  
receive  
bribe.

**151 and 152** of said Code are repealed.

**177.** When an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

Penalty,  
when not  
prescribed.





Criminal  
conspiracy  
defined, and  
punishment  
fixed.

182. If two or more persons conspire:

1. To commit any crime;
2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;
3. Falsely to move or maintain any suit, action, or proceeding;
4. To cheat and defraud any person of any property by any means which are in themselves criminal, or to obtain money or property by false pretenses; or,
5. To commit any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws;

They are punishable by imprisonment in the County Jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

Wearing  
mask or dis-  
guise, when  
unlawful.

185. It shall be unlawful for any person to wear any mask, false whiskers, or any personal disguise (whether complete or partial) for the purpose of:

1. Evading or escaping discovery, recognition, or identification in the commission of any public offense;
  2. Concealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense.
- Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor.

187. The term murder has but one meaning, and that is, the unlawful killing of a human being with malice aforethought, either express or implied. *People v. Haun*, 44 Cal. 96.

188. If homicide is committed by means of willful, deliberate, and premeditated killing, it shows an abandoned and malignant heart. *People v. Williams*, 43 Cal. 344.

Degrees of  
murder.

189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree.

The statute dividing murder into degrees does not make murder in the second degree less or other than murder. *People v. Haun*, 44 Cal. 96. To constitute murder in the first degree there must be deliberation and premeditation. *People v. Valencia*, 43 Cal. 552. In deliberating there need be no appreciable time between the intention to kill and the act of killing. *People v. Williams*, 43 Cal. 344.

**190.** Every person guilty of murder in the first degree, shall suffer death or confinement in the State Prison for life, at the discretion of the jury, trying the same; or upon a plea of guilty, the Court shall determine the same; and every person guilty of murder in the second degree, is punishable by imprisonment in the State Prison not less than ten years. [Approved March 28, 1874. Effect immediately.] Punishment for murder.

**197.** (Subd. 2.) The killing of another is justifiable only when the entry into a habitation is being made in a violent, riotous, or tumultuous manner, for the purpose of offering violence to some person therein, or for the purpose of committing a felony by violence. *People v. Walsh*, 43 Cal. 449.

(Subd. 3.) If a gun be pointed at one in a threatening manner, under such circumstances as to induce a reasonable belief that it is loaded and will be discharged, and thereby produce death, or inflict a great bodily injury on the person threatened, he will be justified in using whatever force will be necessary to avert the apparent danger, though it may afterward appear that the gun was not loaded. *People v. Anderson*, 44 Cal. 65.

**198.** What constitutes fear sufficient to justify killing. See generally. *People v. Walsh*, 43 Cal. 450.

**203.** Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem. Mayhem, defined.

**212.** The fear mentioned in the last section may be either: What fear may be an element of robbery.

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or,







2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery.

220. A person who stands by when an attempt is made by others to commit a rape, but who does not act or aid, or abet its commission, is not guilty of an attempt to commit a rape. *People v. Woodward*, 45 Cal. 293.

Punishment for fighting a duel, sending or accepting a challenge.

227. Every person who fights a duel, or who sends or accepts a challenge to fight a duel, is punishable by imprisonment in the State Prison or in a County Jail not exceeding one year.

Persons fighting duel, etc. disqualified from holding office, etc.

228. Every person who fights a duel, or who sends or accepts a challenge to fight a duel, shall, in addition to the punishment prescribed in the last section, be forever disqualified from holding any office, or from exercising the elective franchise in this State, and shall be declared so disqualified in the judgment upon conviction.

240. An assault made without the use of a deadly weapon, with intent to do mere bodily harm, and not to do murder, is a misdemeanor--nothing more. *People v. Marat*, 45 Cal. 281.

241. Construed, *Petty v. County Court of San Joaquin County*, 45 Cal. 246.

Battery, or an assault and battery, how punished.

243. A battery, or an assault and battery, is punishable by fine not exceeding one thousand dollars, or by imprisonment in the County Jail not exceeding one year.

Assault with deadly weapon.

245. Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the State Prison, or in a County Jail, not exceeding two years, or by fine not exceeding five thousand dollars, or by both.

An assault made with intent not to do murder, but only to do a lesser bodily harm, is not constituted a felony, unless such an assault was made with a deadly weapon, or by resort to means of a deadly nature. *People v. Marat*, 45 Cal. 281.

**248.** A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule. Libel defined.

**266.** Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of eighteen years, into any house of ill-fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; and every person who aids or assists in such inveiglement or enticement; and every person who, by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man, is punishable by imprisonment in the State Prison not exceeding five years, or by imprisonment in a County Jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. Seduction for purpose of prostitution, procuration.

**297.** Every person who shall bury or inter, or cause to be buried or interred, the dead body of any human being, or any human remains, in any place within the corporate limits of any city or town in this State, or within the corporate limits of the city and county of San Francisco, except in a cemetery, or place of burial, now existing under the laws of this State, and in which interments have been made, or that is now or may hereafter be established or organized by the Board of Supervisors of the county, or city and county, in which such city or town, or city and county, is situate, shall be guilty of a misdemeanor. [Approved March 30, 1874. Effect immediately.] Unlawful interments.

**302.** At common law profane swearing was not indictable, except when repeated so often and so publicly as to become an annoyance to the public, and thus a public nuisance. *Ex-parte Delaney*, 43 Cal. 479.





Procuring female to play musical instrument, for hire, &c., in drinking saloon, etc.

306. Every person who causes, procures, or employs any female to play for hire, drink, or gain, upon any musical instrument, in any drinking saloon, ball room, dance cellar, public garden, or any public highway, common or street, or on a ship, steamboat, or railroad car, is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both; and any female so playing upon any musical instrument whatsoever, is punishable by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one month, or by both. (Approved March 10th, 1874.)

Procuring female to play on musical instrument or to dance, etc., for hire, in drinking saloon.

306. Every person who causes, procures, or employs any female for hire, drink, or gain, to play upon any musical instrument, or to dance, promenade, or otherwise exhibit herself, in any drinking saloon, dance cellar, ballroom, public garden, public highway, common, park, or street, or in any ship, steamboat, or railroad car, or in any place whatsoever, if in such place there is connected therewith the sale or use, as a beverage, of any intoxicating, spirituous, vinous, or malt liquors; or who shall allow the same in any premises under his control, where intoxicating, spirituous, vinous, or malt liquors are sold or used, when two or more persons are present, is punishable by a fine not less than fifty nor more than five hundred dollars, or by imprisonment in the County Jail not exceeding three months, or by both; and every female so playing upon any musical instrument, or dancing, promenading, or exhibiting herself, as herein aforesaid, is punishable by a fine not exceeding one hundred dollars, or by imprisonment in the County Jail not exceeding one month, or by both. (Approved March 30th, 1874.)

Procuring female to dance, etc., for hire, in drinking saloon.

307. Every person who causes, or procures, or employs any female to dance, promenade, or otherwise exhibit herself for hire, drink, or gain, in any drinking saloon, dance cellar, ball room, public garden, public

highway, or any place of a similar or immoral character, is punishable by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both; and every female so dancing, promenading, or exhibiting herself, is punishable by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one month, or by both. [Approved March 10, 1874; 60 days.]

307 of the Penal Code, as amended by an Act entitled "An Act to amend sections three hundred and six and three hundred and seven of the Penal Code," approved March tenth, eighteen hundred and seventy-four, is hereby repealed. [Approved March 30th, 1874.] Repealed.

311. Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

Indecent exposures, exhibitions and pictures.

2. Procures, counsels, or assists any person so to expose himself, or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or,

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or moulds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print, or figure; or,

5. Sings any lewd or obscene song, ballad, or other words, in any public place, or in any place where there are persons present to be annoyed thereby—Is guilty of a misdemeanor.







Keeping  
disorderly  
houses.

**316.** Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.

Writing or  
publishing  
notices of  
means to  
procure  
abortion or  
miscar-  
riage.

**317.** Every person who willfully writes, composes, or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise, to assist in the accomplishment of any such purpose, is guilty of a felony.

Owner or  
lessee of  
drinking  
place per-  
mitting  
minors to  
play at  
game of  
chance.

**336.** Every owner or lessee, or keeper of any house used in whole, or in part, as a saloon or drinking place, who knowingly permits any person under twenty-one years of age to play at any game of chance therein, is guilty of a misdemeanor. [Approved March 24th, 1874.]

Mismanage-  
ment of  
Steamboats,  
a felony.

**348.** Every captain or other person having charge of any steamboat used for the conveyance of passengers, or of the boilers and engines thereof, who, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, or any apparatus or machinery connected therewith, by which bursting or breaking human life is endangered, is guilty of a felony.

Mismanage-  
ment of  
Steam boiler,  
a felony.

**349.** Every engineer or other person having charge of any steam boiler, steam engine, or other apparatus for generating or employing steam, used in any manufactory, railway, or other mechanical works, who willfully, or from ignorance, or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst or

break the boiler or engine, or apparatus, or cause any other accident whereby human life is endangered, is guilty of a felony.

**370.** Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.

Public nuis-  
ances, de-  
fined

**371.** An act which affects an entire community or neighborhood, or any considerably number of persons, as specified in the last section, is not less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

Unequal  
annoyance  
or damage.

**379.** Every person, not the master or owner, or not authorized to act as pilot under the laws of this State, who pilots or offers to pilot any vessel to or from any port of this State for which there are commissioned or licensed pilots, or who pilots or offers to pilot any vessel to or from any port other than that for which he is commissioned or licensed, and for which there are pilots so commissioned or licensed, is guilty of a misdemeanor.

Unlicensed  
piloting.

**381.** Every person who, in putting up in any bag, bale, box, barrel, or other package, any hops, cotton, wool, grain, hay, or other goods usually sold in bags, bales, boxes, barrels, or packages by weight, puts in or conceals therein anything whatever, for the purpose of increasing the weight of such bag, bale, box, barrel or package, with intent thereby to sell the goods therein, or to enable another to sell the same, for an increased weight, is punishable by fine of not less than twenty-five dollars for each offense.

Putting ex-  
traneous  
substances  
in packages  
of goods  
usually sold  
by weight,  
with intent  
to increase  
weight.





Sale of intoxicating liquors to drunkards or Indians.

**397.** Every person who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any habitual or common drunkard, or Indian, is guilty of misdemeanor. [Approved March 26th, 1874.]

Exhibiting deformities for hire.

**400.** Every person exhibiting the deformities of another, or his own deformities, for hire, is guilty of a misdemeanor; and every person who shall by any artificial means give to any person the appearance of a deformity, and shall exhibit such person for hire, shall be guilty of a misdemeanor. [Approved February 4, 1874.]

Aiding advising or encouraging suicide.

**400.** Every person who deliberately aids or advises, or encourages, another to commit suicide, is guilty of a felony.

**462.** A distinct offense from that defined in Section 459, ante. *People v. Taggart*, 43 Cal. 83.

Guilty possession of burglarious implements

**466.** Every person having upon him, or in his possession, a pick-lock, crow, key, bit, or other instrument or tool, with intent feloniously to break or enter into any building, or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument above named, so that the same will fit or open the lock of a building, without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing, or having reason to believe, that it is intended to be used in committing a misdemeanor or felony, is guilty of misdemeanor. Any of the structures mentioned in section four hundred and fifty-nine of this Code, shall be deemed to be a building within the meaning of this section. [Approved March 3, 1874.]

**475.** To constitute the crime of possessing forged notes with intent to pass them, the law only requires the guilty possession. It is not necessary that the intent to fill up unfinished notes should be proven by an attempt to do so. Possession, with knowledge of the purpose for which they are designed, is sufficient. *People v. Ah Sam*, 41 Cal. 645.

**481.** Every person who counterfeits, forges, or alters any ticket, check, order, coupon, receipt for fare or pass, issued by any railroad company, or by any lessee or manager thereof, designed to entitle the holder to ride in the cars of such company, or who utters, publishes or puts into circulation, any such counterfeit, or altered ticket, check, or order, coupon, receipt for fare or pass, with intent to defraud any such railroad company, or any lessee thereof, or any other person, is punishable by imprisonment in the State Prison, or in the County Jail, not exceeding one year, or by fine not exceeding one thousand dollars, or by both such imprisonment and fine.

Counter-  
feiting or  
forging  
ticket,  
check, etc.,  
Railroad  
Company.

**482.** Every person who, for the purpose of restoring to its original appearance and nominal value in whole or in part, removes, conceals, fills up, or obliterates, the cuts, marks, punch-holes, or other evidence of cancelation, from any ticket, check, order, coupon, receipt for fare or pass, issued by any railroad company, or any lessee or manager thereof, canceled in whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessee thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the County Jail, not exceeding six months, or by a fine not exceeding one thousand dollars, or by both such imprisonment and fine.

Restoring  
cancelled  
ticket,  
check, etc.,  
of Railroad  
Company,  
or offering  
the same in  
payment of  
fare.

**496.** Every person who, for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to have been stolen, is punishable by imprisonment in the State Prison not exceeding five years, or in the county jail not exceeding six months, or by both; and it shall be presumptive evidence that such property

Buying or  
receiving  
stolen  
goods.







Purchase  
from minor,  
as presum-  
ptive evi-  
dence

was stolen, if the same consists of jewelry, silver, or plated ware, or articles of personal ornament, if purchased or received from a person under the age of eighteen, unless said property is sold by said minor at a fixed place of business carried on by said minor or his employer. [Approved February 28, 1874. Effect immediately.]

It was intended to provide for the punishment of receivers of stolen goods, in the cases in which it might be impossible to identify with certainty the thieves, as in cases of professional receivers of stolen goods. *People v. Avila*, 43 Cal. 197. If the defendant is seen in the possession of the stolen property shortly after it was stolen, and does not explain his possession, by showing that it was honestly acquired, it is a circumstance tending to show his guilt. *People v. Gill*, 45 Cal. 285.

521. The Act entitled "An Act to prevent extortion in office, and to enforce official duty," approved March 14, 1853, was designed to afford a remedy of a summary character against office holders who were guilty of extortion, or of neglect in the performance of official duties. *Matter of J. J. Marks*, 45 Cal. 199.

533. The giving of a mortgage upon land by a party who has already conveyed his title to another by deed, is not disposing of the land within the meaning of the statute, which makes it a felony to fraudulently sell land after having once sold it. *People v. Cox*, 45 Cal. 342.

Repealed.

582 of said Code is repealed.

Malicious  
injuries to  
freehold.

602. Every person who willfully commits any trespass, by either:

1. Cutting down, destroying, or injuring any kind of wood or timber standing or growing upon the lands of another ; or,

2. Carrying away any kind of wood or timber lying on such lands; or,

3. Maliciously injuring or severing from the freehold of another anything attached thereto, or the produce thereof; or,

4. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil, or stone; or,

5. Digging, taking, or carrying away from any land

in any of the cities of the State, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil, or stone; or,

6. Putting up, affixing, fastening, printing, or painting upon any property belonging to the State, or to any city, county, town or village, or dedicated to the public, or upon any property of any person, without license from the owner, any notice, advertisement, or designation of, or any name for, any commodity, whether for sale or otherwise, or any picture, sign, or device, intended to call attention thereto;

—Is guilty of a misdemeanor.

632. Every person who, in the counties of Santa Clara, Santa Cruz, San Mateo, Monterey, Alameda, Marin, Placer, Nevada, Plumas, or Sierra, at any time takes or catches any trout, except with hook or line, is guilty of a misdemeanor. [Approved March 18, 1874.]

Catching trout other than with hook and line.

634. Every person who, between the first day of August and the first day of November, in each year, takes or catches any salmon, is guilty of a misdemeanor; the possession of any salmon during said period, shall be *prima facie* evidence of a violation of this section. Any person catching, or having in possession, or offering for sale shad, within three years from the passage of this Act, shall be guilty of a misdemeanor. [Approved March 30, 1874. Effect immediately.]

Salmon catching restricted.

Shad catching prohibited.

654. Every parent, guardian, or other person, who upbraids, insults, or abuses any teacher of the public schools, in the presence or hearing of a pupil thereof, is guilty of a misdemeanor.

Upbraiding, insulting, or abusing public school teacher.

667. Under the Penal Code, there is no distinction between the first conviction of petit larceny, had anterior to January 1st, 1873, and a conviction for the same offense had after that date. *Ex-parte* Gutierrez, 45 Cal. 429.





673. The forfeiture and disabilities imposed by the Common Law upon persons attainted of felony, are unknown to the laws of this State. No consequences follow a conviction for felony, except such as are declared by statute. *Estate of Nerac*, 35 Cal. 392.

Limitation  
on two pre-  
ceding sec-  
tions.

675. The provisions of the last two preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property.

Valuation  
of property  
under this  
Code to be  
estimated  
in gold coin.

678. Whenever in this Code the character or grade of an offense, or its punishment, is made to depend upon the value of the property, such value shall be estimated exclusively in United States gold coin.

688. To require the prisoner, during the progress of the trial, to appear and remain with chains and shackles upon his limbs, without evident necessity, as a means of securing his presence for judgment, is a violation of the Common Law rules, and of the statute. *People v. Harrington*, 42 Cal. 165.

Jurisdiction  
on violation  
of law re-  
lating to  
prize fights.

795. The jurisdiction of a violation of sections 412, 413 and 414 of the Penal Code, or a conspiracy to violate either of said sections, is in any county, first, in which any act is done toward the commission of the offense; or, second, into, out of, or through which the offender passed to commit the offense; or, third, where the offender is arrested. [Approved March 7, 1874; 60 days.]

799. As against murder, whether of the first or second degree, there is no limitation. *People v. Haun*, 44 Cal. 96.

829. Within the meaning of the Criminal Practice Act, a prisoner released on bail is not imprisoned during such release. *Ex parte Jones & Ellwood*, 41 Cal. 209.

Doors and  
windows  
may be  
broken,  
when.

844. To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they

have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

858. The Act to regulate proceedings before committing magistrates contains no provision authorizing or permitting an oath to be administered to the person accused. He is not to be examined generally, nor cross-examined at all. *People v. Gibbons*, 43 Cal. 557. The Act of 1866, authorizing accused persons to become witnesses in their own behalf, is not applicable to preliminary examination. *Id.* "Charge" in preliminary examination and in indictments distinguished. *Ex parte Ryan*, 44 Cal. 557.

872. When a party is convicted of a criminal offense, and appeals to the County Court, and, pending the appeal, is released on bail, and the judgment is affirmed, a second commitment need only recite the judgment of conviction, and state that defendant appealed, and that judgment was affirmed. It need not recite the judgment of the County Court, or that a remittitur had been issued. *Ex parte Jones & Ellwood*, 44 Cal. 209.

877. The mere recommendation of a Grand Jury that such party be detained to answer before another Grand Jury, is not of itself good cause for his detention. *Ex parte Bull*, 42 Cal. 197. The facts constituting good cause for the detention of a party, not indicted, at the next term, must, in a great measure, be left to the discretion of the Court, to be determined by the particular circumstances of each case. *Id.*

896. A challenge to an individual Grand Juror may be interposed for one or more of the following causes only: Challenge  
to Grand  
Juror.

1. That he is a minor;
2. That he is an alien;
3. That he is insane;
4. That he is a prosecutor upon a charge against the defendant;

5. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such;

6. That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or







cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the Court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him.

Manner of taking and trying challenge.

897. The challenges mentioned in the last three sections may be oral or in writing, and must be tried by the Court.

Oath of Foreman.

903. The following oath must be administered to the Foreman of the Grand Jury: "You, as Foreman of the Grand Jury, will diligently inquire into, and true presentment make, of all public offenses against the people of this State, committed or triable within this county, of which you shall have or can obtain legal evidence. You will keep your own counsel and that of your fellows and of the Government, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other Grand Juror may have said, nor the manner in which you or any other Grand Juror may have voted on any matter before you. You will present no person through malice, hatred, or ill-will, nor leave any unrepresented through fear, favor, or affection, or for any reward, or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God."

950. In an indictment for receiving stolen property, the allegation of the name of the person who stole the goods, or that his name is unknown to the Grand Jury, is unnecessary and immaterial. *People v. Avila*, 43 Cal. 197.

Indictment must charge but one offense.

954. The indictment must charge but one offense, but the same offense may be set forth in different forms under different counts, and, when the offense may be

committed by the use of different means, the means may be alleged in the alternative in the same count.

An indictment against two persons for murder may charge in one count one as principal and the other as accessory, and in another count the latter as principal and the former as accessory. *People v. Valencia*, 43 Cal. 552. Such indictment does not charge each defendant with two offenses, nor are the two counts repugnant. *Id.* Sufficiency of indictment for possessing unfinished forged bank bills, containing two descriptions of same offense. *People v. Ah Sam*, 41 Cal. 645. Burglary and housebreaking are two distinct offenses, and cannot be made to constitute one offense by means of an averment in the indictment to that effect. *People v. Taggart*, 43 Cal. 81.

956. In an indictment for arson, the building burned may be alleged to have been the property of one not the owner, but who was occupying it as a residence when it was burned. *People v. Wooley*, 44 Cal. 494.

959. ARSON.—An indictment for arson, which charges that the defendant, at a time named, was in the county where it is found, and then and there feloniously burned a building, sufficiently shows that the offense was committed at a place within the jurisdiction of the Court. *People v. Wooley*, 44 Cal. 494.

ASSAULT WITH DEADLY WEAPON.—An indictment for an assault with a deadly weapon, with intent to do bodily injury to another, may in general terms aver the assault to have been made "with a deadly weapon." *People v. Congleton*, 44 Cal. 93. The weapon by name, does not in such case, become a necessary ingredient of the crime, but the nature of the weapon, as being deadly or otherwise, is alone important; and it is essential to aver it in some appropriate way, to have been deadly in its character. *Id.*

BURGLARY.—In an indictment for burglary, an allegation that the prisoner in the night time entered feloniously, burglariously, and with force and arms, is substantially to say, *felonice et burglariter fregit*. *People v. Long*, 43 Cal. 445.

LARCENY.—An allegation of the ownership of the stolen property, is essential in an indictment for larceny, unless the offense is otherwise sufficiently described. *People v. Hughes*, 41 Cal. 234.

MURDER.—In an indictment for murder, it was charged that the accused "on the fourth day of September, A. D. 1870, at the county and State aforesaid, did feloniously, willfully, maliciously, and of his malice aforethought, shoot, kill and murder one Enoch Barnes:" *Held*, to be a sufficient charge of the death of Barnes. *People v. Sanford*, 43 Cal. 29.

RECOVERING STOLEN PROPERTY.—A charge in an indictment which alleges that the defendant received certain stolen property for his own gain, knowing that it was stolen property, is sufficient, without alleging that he received it both for his own gain and to prevent the owner from again possessing his property. *People v. Avila*, 43 Cal. 197.





Pleading in indictment for larceny or embezzlement.

967. In an indictment for the larceny or embezzlement of money, banknotes, certificates of stock, or valuable securities, or for a conspiracy to cheat and defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, banknotes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof.

Previous conviction of another offence, how stated in indictment.

969. In charging in an indictment the fact of a previous conviction of a felony, or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of petit larceny, it is sufficient to state: "That the defendant, before the commission of the offense charged in this indictment, was in [giving the title of the Court in which the conviction was had] convicted of a felony [or attempt, etc., or of petit larceny]." If more than one previous conviction be charged in the indictment, the date of the judgment upon each conviction shall be stated, and not more than two previous convictions shall be charged in any one indictment.

Distinction between accessories before the fact and principal, abrogated.

971. The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be indicted, tried, and punished as principals, and no additional facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal.

Accessory may be indicted and tried though principal has not been or has been acquitted.

972. An accessory to the commission of a felony may be indicted, tried and punished, though the principal may be neither indicted nor tried, and though the principal may have been acquitted.

985. When the indictment is for a felony, and the defendant, before the finding thereof, has given bail for his appearance to answer the charge, the Court to which the indictment is presented, or in which it is pending, may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order.

Ordering defendant into custody or increasing bail when indictment is for felony.

1004. A demurrer to an indictment that it charges two offenses, is permitted. *People v. Taggart*, 43 Cal. 81.

1016. The plea of a defendant confessing himself guilty of a crime, should not be entered, except with his express consent, given by him personally in directions in open Court. *People v. McCrory*, 41 Cal. 458. No plea of present insanity is required. If, at any time during the trial, a doubt arises as to the sanity of the defendant, it is the duty of the Court of its own motion, to suspend further proceedings in the case until the question of sanity has been determined. *People v. Ah Ying*, 42 Cal. 18. Counsel for defendant cannot waive the inquiry. *Id.* Drunkenness cannot be given in evidence, as an excuse for crime; but when in a case of homicide, the jury are to pass on the question of premeditation, for the purpose of fixing the degree of the crime, drunkenness may be taken into consideration, for the purpose solely of passing on the fact of premeditation, keeping in view the fact that a drunken man may act with premeditation as well as a sober one. *People v. Williams*, 43 Cal. 344. Mere threats antecedently made, amount to no excuse for a deadly assault, when the party assailed has made no demonstration of a hostile or equivocal character. *People v. Wright*, 45 Cal. 260. Evidence of threats when not admissible. *People v. Renfrow*, 41 Cal. 37.

1018. Discretion of Court in permission of withdrawal of plea of "guilty." *People v. McCrory*, 41 Cal. 458. A party should not be permitted to trifle with the Court, by deliberately entering a plea of guilty on one day, and capriciously withdrawing it the next. *People v. McCrory*, 41 Cal. 458. The Court should be indulgent in permitting the plea to be withdrawn, when there is reason to believe that it has been entered through inadvertence, and without deliberation, or ignorantly, and mainly from the hope that the punishment to which the accused would be otherwise exposed, may thereby be mitigated. *Id.*

1021. Acquittal for variance when a bar to subsequent prosecution. *People v. Hughes*, 41 Cal. 234. Discharge of jury, because unable to agree, when not an acquittal. *Ex-parte McLaughlin*, 41 Cal. 211. Former trial when a bar. *Ex-parte Hartman*, 44 Cal. 32. Failure of jury to agree, before adjournment of term, when a bar. *Ex-parte Cage*, 45 Cal. 248.







Previous conviction. Issue on question now made and tried.

**1025.** When a defendant, who is charged in the indictment with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer shall be entered by the clerk in the minutes of the Court, and shall, unless withdrawn by consent of the Court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answer that he has not, his answer shall be entered by the clerk in the minutes of the Court, and the question whether or not he has suffered such previous conviction, shall be tried by the jury which tries the issue upon the plea of "not guilty," or in case of a plea of "guilty," by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads "not guilty," and answers that he has suffered the previous conviction, the charge of the previous conviction shall not be read to the jury, nor alluded to on the trial.

Transmission of indictment from County to District Courts.

**1028.** When an indictment is found in the County Court for treason, misprision of treason, murder, or manslaughter, it must be transmitted by the clerk to a District Court of the county for trial, except when the indictment is found against a person holding the office of District Judge.

Indictments against County Judge to be transmitted.

**1029.** All indictments found against a County Judge must also be transmitted to a District Court of the county for trial.

Ordering of disposing of issues on the calendar.

**1048.** The issues on the calendar must be disposed of in the following order, unless for good cause the Court shall direct an indictment to be tried out of its order:

1. Indictments for felony, when the defendant is in custody;

2. Indictments for misdemeanor, when the defendant is in custody;

3. Indictment for felony, when the defendant is on bail;

4. Indictment for misdemeanor, when the defendant is on bail;

**1052.** When an indictment is called for trial, or at any time previous thereto, the Court may, upon sufficient cause, direct the trial to be postponed to another day of the same, or of the next term.

Postponement, when may be ordered.

Where there is a sufficient showing as to the materiality of absent witnesses, and no apparent lack of diligence in the effort to procure their attendance, a motion to continue a cause for the term, particularly if it be the first application, should be granted. *People v. McCrory*, 41 Cal. 458.

**1070.** If the offense charged be punishable with death, or with imprisonment in the State Prison for life, the defendant is entitled to twenty, and the State to ten peremptory challenges. On a trial for any other offense, the defendant is entitled to ten and the State to five peremptory challenges.

Number of peremptory challenges.

**1072.** Where a juror, whose name is on the poll tax list only, is sworn to try the cause, and the defendant receives the juror without objection as to his competency, he cannot be heard, after verdict is rendered, to object that the juror was lacking in this particular. *People v. Sanford*, 43 Cal. 29.

**1073.** Particular causes of challenge are of two kinds:

Particular causes of challenges.

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this Code as implied bias;

2. For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this Code as actual bias.

A challenge to a juror for actual bias must be entered on the minutes of the Court, and an application must be made to the Court to have triers appointed. *People v. Renfrow*, 41 Cal. 37.





Grounds of  
challenge  
for implied  
bias.

**1074.** A challenge for implied bias may be taken for all and any of the following causes, and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution;

4. Having served on the Grand Jury which found the indictment, or on a Coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury which has tried another person for the offense charged in the indictment;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it;

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense;

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

(Subd. 8.) The mere formation of hypothetical opinions as to the guilt or innocence of the prisoner, founded on hearsay or information, and unaccompanied with malice or ill will, is not sufficient to support a challenge for implied bias. *People v. Murphy*, 45 Cal. 137.

**IN GENERAL.**—A challenge in a criminal case must specify the particular ground of challenge. If for bias, it must state what kind of bias, and the particular cause from which such bias is to be inferred.

People v. Renfrow, 41 Cal. 37; People v. McGungill, 41 Cal. 429; People v. Walsh, 43 Cal. 447. An unqualified expression of an opinion, even though the opinion itself be of a qualified character, is ground of challenge for implied bias. People v. Brotherton, 43 Cal. 530; People v. Edwards, 41 Cal. 640. When disallowance of challenge not prejudicial. People v. McGungill, 41 Cal. 429.

1076. In a challenge for implied bias, one or more of the causes stated in §1074 must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of §1073 must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the Court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered in the minutes of the Court or of the phonographic reporter.

Causes of challenge, how stated. Juror not to be excused.

1077. It is no answer to a challenge for implied bias to say that in the mind or thought of the party challenged, the opinion was qualified, though in its form of expression it was unqualified. The admitted fact being that he had unqualifiedly expressed his opinion upon the question of the guilt or innocence of the prisoner, he was thereby in judgment of law incompetent to serve as a juror. People v. Edwards, 41 Cal. 640.

1078. If the facts are denied, the challenge must be tried by the Court.

Challenge to be tried by the Court.

1079. If an objection is to be made to the appointment of a trier in a criminal case, it must be made at the time, and the grounds of objection brought to the attention of the Court; and if the objection be overruled, an exception must be reserved in the usual mode. People v. Voll, 43 Cal. 166.

1079, 1080 of said Code are repealed.

Repealed.

1083. The Court must allow or disallow the challenge, and its decision must be entered in the minutes of the Court.

Decision of Court to be entered.







Repealed.

**1084, 1085** of said Code are repealed.

**1085.** When after proper investigation had, doubts, more or less grave, as to the actual state of mind of the juror still remain, the challenge for implied bias should be allowed. *People v. Brotherton*, 43 Cal. 530.

Order of trial.

**1093.** The jury having been impaneled and sworn, the trial must proceed in the following order, unless otherwise directed by the Court:

1. If the indictment be for felony, the Clerk must read it, and state the plea of the defendant to the jury. And in cases where the indictment charges a previous conviction, and the defendant has confessed the same, the Clerk, in reading such indictment, shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with;

2. The District Attorney, or other counsel for the people, must open the cause and offer the evidence in support of the indictment;

3. The defendant, or his counsel, may then open the defense, and offer his evidence in support thereof;

4. The parties may then respectively offer rebutting testimony only, unless the Court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the District Attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the Court and jury; the District Attorney, or other counsel for the people, opening the argument, and having the right to close;

6. The Judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party; and he may state the testimony and declare the law. If the charge be not given in writing, it must be taken down by the phonographic reporter.

(Subd. 5.) Order of arguments of counsel. *People v. Fair*, 43 Cal. 137. Discretion of Court as to who to open. *Id.* Where two counsel on each side argue the case, they must speak alternately; and, if the

prosecution open, the defense has the right to the close; and it is error to refuse an application to do so. *Id.* The counsel for the prisoner is not entitled to make his argument on the case made out by the prosecution when the prosecution closes. The argument is to be made when the evidence is concluded. *People v. Williams*, 43 Cal. 344. In a criminal case, it is competent for the District Court to require the counsel for the defendant to open and the counsel for the prosecution to close the argument to the jury. The Court need not state any reasons for such ruling. *People v. Haun*, 44 Cal. 96. It is irregular for counsel for the prosecution against objections of defendant's counsel, to comment on the refusal of defendant to be cross-examined to the whole case. *People v. McGungill*, 41 Cal. 429.

(Subd. 6.) In criminal cases, it is a fatal error to give oral instructions to the jury without the consent of defendant. *People v. Trim*, 37 Cal. 274; *People v. Sanford*, 43 Cal. 29; *People v. Max*, 45 Cal. 254. And the consent of the defendant cannot be presumed from his presence and failure to make objections when the oral instruction is given. *People v. Sanford*, 43 Cal. 29; *People v. Prospero*, 44 Cal. 186. A written charge may be waived. *People v. Bumberger*, 45 Cal. 650. The Court may, by the express consent of the defendant, or by the mutual consent of the parties, charge the jury orally. *People v. Kearney*, 43 Cal. 383. An entry in the minutes of the Court that "the Court charge the jury orally" (a written charge being expressly waived), must be construed as a "mutual consent to an oral charge. *Id.*

INSTRUCTIONS ON VARIOUS POINTS.—Reasonable doubt. *People v. Ashe*, 44 Cal. 288. Circumstantial evidence. *People v. Padillia*, 42 Cal. 536. Insanity. *People v. Bumberger*, 45 Cal. 650. Deliberation of accused before the killing. *People v. Williams*, 43 Cal. 344. *People v. Valencia*, 43 Cal. 552. Malice and deliberation. *People v. Donahue*, 45 Cal. 321. Implication of law. *People v. Woody*, 45 Cal. 289. Guilty possession. *People v. Rodundo*, 44 Cal. 538.

1096: Defendant entitled to benefit of doubt. *People v. Moody*, 45 Cal. 289. Reasonable doubt, what is. *People v. Ashe*, 44 Cal. 288.

1102. CHARACTER.—Accused persons entitled to presumptions of character of ordinary fairness. *People v. Fair*, 43 Cal. 137. Evidence of character when admissible. *People v. Edwards*, 41 Cal. 640. On the trial for larceny if the defendant introduces testimony tending to show his good character, the jury cannot disregard this testimony but must take it into consideration with the testimony tending to establish his guilt. *People v. Raina*, 45 Cal. 289. Proof of good character a fact for the jury. *People v. Ashe*, 44 Cal. 288.

CONFESSIONS AND DECLARATIONS.—*People v. Johnson*, 41 Cal. 452. Presumptions as to subsequent confessions. *Id.*

REPUTATION.—It is competent to prove by reputation the existence of a corporation. *People v. Ah Sam*, 41 Cal. 645.





**STATEMENTS.**—The evidence of the committing magistrate, as to the statement made by the prisoner on his preliminary examination, is not admissible on the trial. *People v. Gibbons*, 43 Cal. 557.

**PROOF OF "LOCUS DELECTI."**—Where the evidence tended to show that the offense charged in the indictment was committed at a certain saloon; but there was nothing in the record tending to show that the saloon was situated in the county, there was a failure to prove the *locus delecti*. *People v. Parks*, 44 Cal. 105.

**WITNESSES.**—The rule that no person is to be held incompetent on account of matters of religious belief applies to dying declarations. *People v. Sanford*, 43 Cal. 29.

**ACCESSORY.**—One jointly indicted as accessory after the fact, is a competent witness for the people on the trial of the principal. *People v. Rodundo*, 44 Cal. 538.

**SHERIFF.**—May testify to statements made to him by the accused after his arrest, if such statements are made voluntarily, without any threats or promises of reward. *People v. Rodundo*, 44 Cal. 538.

**EXPERTS.**—A witness, though not an expert, may in connection with a conversation detailed by him state his opinion, belief, or impression as to the state of mind of such person as these seemed to the witness at the time of the conversation. *People v. Sanford*, 43 Cal. 29.

**DEFENDANT AS A WITNESS IN HIS OWN BEHALF.**—The fact that a defendant offers himself as a witness in his own behalf does not change or modify the rules of practice with reference to the proper limits of cross-examination, and does not make him a witness for the State against himself. *People v. McGungill*, 41 Cal. 429. That the credit to be given to his testimony must be left solely to the jury, under instructions of the Court, does not establish a new rule, but simply applies to defendants a rule which exists as to all other witnesses. *People v. Rodundo*, 44 Cal. 538.

**IMPEACHMENT OF WITNESS.**—The prosecution may show by other witnesses that a witness for defendant had given a different account of what occurred at the time the offense was committed from that testified to by the witness on the stand. *People v. Nyland*, 41 Cal. 129. Where the defendant introduces witnesses to impeach the credibility of one of plaintiff's witnesses it is not an abuse of discretion in the Court to limit him to eight witnesses, provided the plaintiff introduces no witnesses to sustain the credibility. *People v. Murray*, 41 Cal. 66.

**EVIDENCE NECESSARY TO CONVICT.**—*People v. Padillia*, 42 Cal. 536, Inference of guilt from circumstantial evidence. *People v. Murray*, 41 Cal. 66.

1127. See, generally: *People v. Hart*, 44 Cal. 598. Where a party in a criminal case, fails to ask the Court to give instructions to the jury upon a particular point, he cannot complain of the error on the part of the Court in not giving the instructions. *People v. Haun*, 44 Cal. 96. Where an instruction asked for has already been given substantially by the Court, it is not error to refuse it; but in a criminal case the better course is to give it. *People v. Murray*, 41 Cal. 66.

**1131.** Upon a trial for larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, the allegation of the indictment, so far as regards the description of the property, is sustained if the offender be proved to have embezzled or stolen any money, bank notes, certificates of stock, or valuable security, although the particular species of coin or other money, or the number, denomination, or kind of bank notes, certificates of stock, or valuable security, be not proved; and upon a trial for embezzlement, if the offender be proved to have embezzled any piece of coin or other money, any bank note, certificate of stock, or valuable security, although such piece of coin or other money, or such bank note, certificate of stock, or valuable security, may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

Allegations of indictment for larceny or embezzlement, when deemed sustained.

**1138.** After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into Court. Upon being brought into Court, the information required must be given in the presence of, or after notice to, the District Attorney, and the defendant or his counsel, or after they have been called.

Jury, after retiring may return for information.

**1151.** A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either "for the people" or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity." When the defendant is acquitted on the ground of variance

General verdict.







between the indictment and the proof, the verdict must be "not guilty by reason of variance between indictment and proof."

Verdict on charge of previous conviction.

**1158.** Whenever the fact of a previous conviction of another offense is charged in an indictment, the jury, if they find a verdict of guilty of the offense for which he is indicted, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: "We find the charge of previous conviction true," or, "We find the charge of previous conviction not true," as they find that the defendant has or has not suffered such conviction.

**1159.** Where the indictment charges an assault with a deadly weapon, with intent to do murder, and the verdict finds the assault to have been made with the intent to do bodily harm, the offense found is necessarily included in the charge. *People v. Congleton*, 44 Cal. 93. A verdict of assault "to do bodily harm upon a person" is equivalent to a verdict of assault "to inflict upon the person of another a bodily injury." *Id.* A verdict finding a defendant guilty of an assault to do great bodily harm, is a verdict for a misdemeanor merely, and does not warrant imprisonment in the State Prison. *Ex parte Mack*, 44 Cal. 579.

**1164.** The irregularity of receiving a verdict in a criminal case, without first calling over the names of the jurors, does not prejudice a defendant if the jury were all present and had agreed. *People v. Rondo*, 44 Cal. 538.

Proceedings on verdict acquittal on ground of insanity.

**1167.** If the jury render a verdict of acquittal on the ground of insanity, the Court may order a jury to be summoned from the jury list of the county, to inquire whether the defendant continues to be insane. The Court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the District Attorney to conduct the proceedings, and counsel may appear for the defendant. The Court may direct the Sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant

insane, he shall be committed by the Sheriff to the State Insane Asylum. If the jury find the defendant sane, he shall be discharged.

**1170.** On the trial of an indictment exceptions may be taken by the defendant to a decision of the Court:

Exceptions may be taken, in what cases.

1. In disallowing a challenge to the panel of the jury, or to an individual juror for implied bias;

2. In admitting or rejecting testimony on the trial of a challenge to a juror for actual bias;

3. In admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue.

Where no exception was reserved on the refusal of the Court to admit proffered testimony, and the proffer was not subsequently renewed, and no effort was made to obtain an ultimate decision on the point: *Held*, that it must be considered waived. *People v. Sanford*, 43 Cal. 29.

**1171.** Where a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of a bill must be prepared by him and presented upon notice of at least two days to the District Attorney, to the Judge for settlement, within ten days after the trial of the cause, unless further time is granted by the Judge, or by a Justice of the Supreme Court, or within that period the draft must be delivered to the Clerk of the Court for the Judge. When received by the Clerk, he must deliver it to the Judge, or transmit it to him at the earliest period practicable. When settled the bill must be signed by the Judge and filed with the Clerk of the Court.

When to be settled. Signed.

**1174.** Where a party desires to have the exceptions mentioned in the last two sections settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days to the adverse party, to the Judge, for settlement, within ten days after the order or ruling complained of is made, unless further time is granted by the Judge, or

Proceedings on settlement of bill of exceptions.





by a Justice of the Supreme Court, or within that period the draft must be delivered to the Clerk of the Court for the Judge. When received by the Clerk, he must deliver it to the Judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the Judge and filed with the Clerk of the Court. If the Judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same, the application may be made in the mode and manner, and under such regulations as that Court may prescribe; and the bill when proven must be certified by the Chief Justice as correct, and filed with the Clerk of the Court in which the action was tried, and when so filed, it has the same force and effect as if settled by the Judge who tried the cause. If the Judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in this section, apply to the Supreme Court to prove the same.

1175. In a criminal case the evidence must appear in a bill of exceptions. *People v. Padillia*, 42 Cal. 536.

1176. This section refers to written charges or instructions which either party may present and ask to be given, and not to the charge which the Court may give on its own motion. *People v. Hart*, 44 Cal. 598.

Effect of  
granting  
new trial.

1180. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment.

1181. (Subd. 3.) The retirement of the jury for a necessary purpose for a few moments, with the permission of the Sheriff, and positive proof that during such retirement they did not communicate with any one or with each other, is not sufficient ground for a new trial. *People v. Moore*, 41 Cal. 238.

(Subd. 7.) The affidavits in support of a motion for new trial, on the ground of newly discovered evidence in a criminal case, must set forth such evidence as would be received on the trial. *People v. Voll*, 43 Cal. 166. Generally: The disqualification of a juror is not a ground for new trial, when the objection is taken for the first time after the trial. *People v. Fair*, 43 Cal. 137, overruling *People v. Plummer*, 9 Cal. 298. The words "in the following cases" only clearly exclude all other grounds whatsoever. *People v. Fair*, 43 Cal. 137. The Court will not grant a new trial on the ground that the evidence does not justify the verdict, if the evidence is conflicting. *People v. Gill*, 45 Cal. 285.

1182. A motion for new trial must be made *viva voce*, and if desired, the ground of the motion and the rulings of the Court thereon may be embodied in a bill of exceptions, and can be reviewed by the Supreme Court in no other way. *People v. Ah Sam*, 41 Cal. 645.

1183. A Court may, upon its own motion, or upon the application of a party interested, during the continuance of the term, in a criminal case, modify or set aside an erroneous order, and may, upon its own view of fatal defects in an indictment, arrest the judgment without motion. *Ex-parte Hartman*, 44 Cal. 32. If the variance between the allegation in an indictment, and the proof be immaterial, it should be disregarded. *People v. Hughes*, 41 Cal. 231. Under an indictment for assault to commit murder, a conviction of assault made with a deadly weapon to do bodily harm cannot be supported, unless it sufficiently appear upon the face of the indictment that the assault was made with a deadly weapon. *People v. Murat*, 45 Cal. 281.

1187. The effect of an order arresting a judgment, is to place the defendant, as nearly as other controlling rules of law will permit, in the same situation in which he was before the indictment was found. Upon its entry, he must be discharged, unless detained by some other process or legal order. *Ex-parte Hartman*, 44 Cal. 32.

1191. After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the Court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the Court intend to remain in session so long; but if not, then at as remote a time as can reasonably be allowed.

Appointing  
time for  
judgment.

The statute does not require that judgment must of necessity be pronounced at the same term at which the verdict was found. *People v. Felix*, 45 Cal. 163.







1202. The judgment need contain no recital of the particular offense, but only of the general offense within which the particular one is included. *Ex-parte Murray*, 43 Cal. 455.

Fines, what judgment may direct.

1205. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine.

For the crime of an assault, the defendant may be fined not exceeding five hundred dollars, and may be adjudged to pay the costs, and may be imprisoned for the fine, but not for the costs. *Petty v. Co. Ct. of San Joaquin*, 45 Cal. 245. The fees of a reporter are not to be taxed as costs. *Id.*

Entry of judgment and judgment roll.

1207. When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction (if one), and must, within five days, annex together and file the following papers, which will constitute a record of the action:

1. The indictment and a copy of the minutes of the plea or demurrer;
2. A copy of the minutes of the trial;
3. The charges given or refused, and the indorsements thereon; and
4. A copy of the judgment.

This section refers to written charges or instructions which either party may present, and ask to be given, and not to the charge which the Court may give on its own motion. *People v. Hart*, 44 Cal. 598.

1217. The day for carrying into effect the sentence of death should not be designated in the judgment, but in the warrant for the execution. *People v. Murphy*, 45 Cal. 137.

1235. An order of a County Court, directing that a criminal charge ignored by one Grand Jury be submitted to another, is not an appealable order. *People v. Clark*, 42 Cal. 623. Any error committed by the Court in setting aside or modifying an erroneous order, may be reviewed in a proper case upon appeal, but cannot be questioned upon *habeas corpus*. *Ex parte Hartman*, 44 Cal. 32.

Effect of appeal by defendant.

1243. An appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the Clerk of the Court in which the conviction

was had, a certificate of the Judge of such Court, or of a Justice of the Supreme Court, that, in his opinion, there is probable cause for the appeal, but not otherwise.

1258. **PRESUMPTIONS.**—It will not be presumed by the Supreme Court that the Court below charged the jury orally because the record does not state affirmatively that the charge was given in writing. *People v. Wright*, 45 Cal. 260. If the charge appears in the record, and the record shows nothing to the contrary, the presumption will be that it was fully taken down by the Reporter of the Court at the time it was given. *People v. Bumberger*, 45 Cal. 650.

1259. The charge given to a jury upon its own motion forms no part of the judgment roll, and cannot be reviewed on an appeal upon the judgment roll alone. *People v. Hart*, 44 Cal. 598. Any action of the Court, during the progress of the trial for felony, which deprives the defendant of a substantial legal right in the premises, or to his prejudice, to any extent, withholds or abridges a substantial legal or constitutional privilege of defendant, and by him claimed on the trial, is a proper subject-matter of review on appeal. *People v. Harrington*, 42 Cal. 165. The Supreme Court will not consider alleged errors upon merely abstract propositions of law, in giving instructions in a criminal case, but will merely review misdirection or refusal to give proper instructions upon points actually arising in the case. *People v. Walsh*, 43 Cal. 449.

1260. If an appeal is taken on alleged error of the Court in giving instructions, and the evidence is not brought up, the judgment will not be reversed if the evidence might have shown a case that would justify the instruction. *People v. Donahue*, 45 Cal. 321. Where, on a trial for murder, two parts of the charge are contradictory, and one is correct and the other is erroneous, the judgment of conviction will be reversed, even though the appellate Court may be satisfied, from the evidence, that the jury ought to have found the defendant guilty. *People v. Valencia*, 43 Cal. 552.

1263. When a certified copy of a judgment in an appellate Court is remitted to the Court from which the appeal is taken, the appellate Court loses all jurisdiction of the case; and all orders necessary to carry the judgment into effect must be made by the lower Court. The provision of the statute is not confined to judgments in the Supreme Court, but is applicable to proceedings in the County Court. *Ex parte Jones*, 41 Cal. 209.

1270. Case stated why a prisoner charged with a capital offense, was admitted to bail. *Ex parte McLaughlin*, 41 Cal. 211.

1272. The Constitution of this State in declaring bail to be a matter of right, contemplates those cases only in which the party has not been already convicted. *Ex parte Voll*, 41 Cal. 29. The statute which makes bail a matter of discretion after conviction for manslaughter is not unconstitutional. *Id.*





1277. The Court in which a criminal indictment is pending has the authority to fix the amount of bail, irrespective of any action theretofore taken by the committing magistrate. *Ex parte Ryan*, 44 Cal. 555. The authority and discretion of a Court having jurisdiction of an offense should be exercised in admitting to bail, increasing or reducing bail, etc., whenever substantial justice may be thereby prevented. *Id.* If a party be committed for an alleged offense, and an indictment be found against him by a grand jury, in a proceeding as to increasing or diminishing bail, he will be assumed to be guilty. *Id.*

Provisions applicable to bail after indictment.

1288. The provisions contained in section twelve hundred and seventy-nine, twelve hundred and eighty, and twelve hundred and eighty-one, in relation to bail before indictment, apply to bail after indictment.

Court may increase or reduce the amount of bail. Proceedings

1289. After a defendant has been admitted to bail upon an indictment, the Court in which the indictment is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the Court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. If application be made by the defendant for a reduction of the amount, notice of the application must be served upon the District Attorney.

Husband and wife, when not competent witnesses.

1322. Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties.

Defendant as witness, neglect or refusal not to pre-judice.

1323. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding.

Commission, how executed.

1357. The Commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He must publicly administer an oath to the wit-

ness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth ;

2. He must cause the examination of the witness to be reduced to writing, and subscribed by him ;

3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth ;

4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated ;

5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the Commissioner ;

6. The Commissioner must subscribe his name to each sheet of the deposition, and annex the deposition, with the papers and documents proved by the witness, or copies thereof, to the commission, and must close it up under seal, and address it as directed by the indorsement thereon ;

7. If there be a direction on the commission to return it by mail, the Commissioner must immediately deposit it in the nearest Post Office. If any other direction be made by the written consent of the parties, or by the Court or Judge, on the commission as to its return, the Commissioner must comply with the direction.

A copy of this section must be annexed to the commission.

1368. When an indictment is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arise as to the sanity of the defendant, the Court must order the question as to his sanity to be submitted to a jury ; and the trial of the indictment, or the pronouncing of the judgment, must be suspended until the question is

Doubts arising as to sanity of defendant, how determined.  
Trial suspended.







determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the Court, during the tendency of the issue of insanity.

Verdict on trial of sanity, and proceedings thereon.

1370. If the jury find the defendant sane, the trial of the indictment must proceed, or judgment may be pronounced, as the case may be. If the jury find the defendant insane, the trial or judgment must be suspended until he becomes sane, and the Court must order that he be in the meantime committed by the Sheriff to the State Insane Asylum, and that upon his becoming sane he be redelivered to the Sheriff.

1417. *People v. Bowen*, 43 Cal. 439.

The pleas, how put in. Examination of witnesses and commitment.

1429. The defendant may make the same plea as upon an indictment, as provided in section ten hundred and sixteen. His plea must be oral, and entered in the minutes. If the defendant plead guilty, the Court may, before entering such plea, or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed ; and if it appear to the Court that a higher offense has been committed than the offense charged in the complaint, the Court may order the defendant to be committed, or admitted to bail, to answer any indictment which may be found against him by the Grand Jury.

Proceedings on plea of guilty, or on certiorari.

1445. When the defendant pleads guilty, or is convicted, either by the Court or by a jury, the Court must render judgment thereon of fine or imprisonment, or both, as the case may be.

Same.

1446. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine. [Approved March 7, 1874; 60 days.]

Judgment, where to be rendered.

1449. After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, the Court must appoint a time

for rendering judgment, which must not be more than two days nor less than six hours after the verdict is rendered, unless the defendant waive the postponement. If postponed, the Court may hold the defendant to bail to appear for judgment.

**1473.** Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus*, to inquire into the cause of such imprisonment or restraint.

Who may  
prosecute  
writ.

**1483** Where a party is held in custody, under an order which is regular on its face, and which the Court had power to make, he cannot be discharged on *habeas corpus*, because of error in granting the order. *Ex parte Hartman*, 44 Cal. 32. Neither a Court nor Judge will, on *habeas corpus*, investigate or decide the question, whether a jury impaneled to try the prisoner was properly or legally discharged by the Court because of its inability to agree on a verdict. *Ex parte McLaughlin*, 41 Cal. 211. The omission of the name of a person alleged to have been murdered, in a commitment by a Justice of the Peace, is not such a defect as will entitle the accused to be discharged on *habeas corpus*. *Ex parte Ball*, 42 Cal. 197. Errors or omissions made in the entry on the minutes in criminal cases, will not be reviewed on *habeas corpus*. *Ex parte Murray*, 43 Cal. 455. The Court will only inquire if the judgment, as rendered, be upon its face certain and definite in its terms, so that it may be known what punishment the prisoner is to suffer. *Id.* Questions of mere error cannot be inquired into on *habeas corpus*. *Ex parte Max*, 44 Cal. 579.

**1570.** All fines and forfeitures collected in any Court, except Police Courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue must be paid to the County Treasurer of the county in which the Court is held. [Approved March 30, 1874.]

Fines and  
forfeitures,  
how disposed  
of.

**1586.** Contracts for employment of convict labor. *Porter v. Haight*, 45 Cal. 631.

**1587.** The Board of Directors are hereby authorized and required to contract for provisions, clothing, medicines, forage, fuel, and other supplies for the prison, for any period of time not exceeding one year; and such contract shall be given to the lowest bidder, at a

Contracts  
for provisions,  
clothing, etc., to  
be given at  
public letting.





public letting thereof, if the price bid is a fair and reasonable one, and not greater than the usual market value and price. Each bid shall be accompanied by a bond, in such penal sum as said Board shall determine, with good and sufficient sureties, conditioned for the faithful performance of the terms of such contract. Notice of the time, place, and conditions of letting of each contract shall be given, for at least four consecutive weeks, in two daily newspapers in the cities of San Francisco and Sacramento; and also four insertions in a weekly paper published in the county in which the prison is situated. If all the bids made at such letting are deemed unreasonably high, the Board may, in their discretion, decline to contract, and may again advertise for proposals, and may so continue to renew the advertisement until satisfactory contracts may be had; and in the meantime the Board may contract with any one whose offer may be regarded just and proper; but no contract thus made shall be let to run more than sixty days, or shall in any case extend beyond the public letting. No bids shall be accepted, and a contract entered into in pursuance thereof, when such bid is higher than any other bid made at the same letting for the same article, and where a contract can be had at such lower bid. When two or more bids for the same article are equal in amount, the Board may select the one which, all things considered, may by them be thought best for the interest of the State, or may divide the contract between the bidders, as in their discretion may seem proper and right; *provided*, no contract shall be given, or purchase made, where either of the Board, or any of the officers of the prison, is interested. All contracts or purchases made in violation of this section, shall be void. [Approved February 24th, 1874.]

## PENAL CODE, 1873-4.

*AN ACT providing for the Removal of Civil Officers, for a violation of Official Duties.*

(Enacting Clause,]

SECTION 1. Any member of any Board of Directors, Board of Commissioners, or other Board of Officers, State, city, county, or district, or other person who has been elected or appointed, or who shall hereafter be elected or appointed to hold, control, build, or manage any public building of the State, or of any county, city, or city and county, in this State, or to hold, control, manage or disburse any of the public funds of this State, or of any county, city, or city and county in this State, or any person acting by, through, or under the authority of any such Board of Directors, Board of Commissioners, or other Board of Officers, or other persons, as aforesaid, or any other officer in the State who shall be guilty of a willful violation of any of the provisions of the statute under which he or they were, or may be hereafter elected or appointed, or of any other statute or statutes of this State prescribing or defining their duties and powers, or passed for their government and control, or who shall be guilty of any other willful violation of official duty, shall be deprived of his office, and otherwise punished, in accordance with the provisions of section two of this Act.

Civil officers may be removed for violation of official duties.

SEC. 2. Whenever any complaint in writing, duly verified by the oath of any complainant, shall be presented to the District Court, alleging that any of the officers, or other persons referred to in section one of this Act, have, within the jurisdiction of said Court, been guilty of a violation of the provisions of said section, or of any other statute or statutes of this State which have been, or may hereafter be, passed for their government and control, or prescribing or defining their duties and powers, it shall be the duty of said Court to cite the party or parties charged to appear before him on a certain day, not more than ten nor less than five days from the time when said complaint shall be presented; and on that day, or some subsequent day, not more than twenty days from that on which said complaint is presented, shall proceed to hear, in a summary manner, the complaint and evidence offered in support of the same, and the evidence offered by the party or parties complained of; and if in such hearing it shall appear that the charge or charges contained in said complaint are sustained, the Court shall enter a decree that said party or parties complained of shall be deprived of his or their office or position, and shall enter judgment for one hundred dollars in favor of the complainant, and for such costs as are allowed in civil cases.

Proceedings in action for removal of civil officer.

Decree and judgment.

SEC. 3. This Act shall not be construed to repeal or impair the provisions of any other Act concerning officers in force at the time of the passage hereof, but shall be construed to be a cumulative remedy for the enforcement of official duty, and not otherwise.

Remedy, cumulative.

[Approved March 30, 1874. Effect immediately.]







## PENAL CODE, 1873-4.

*AN ACT to prevent the Sale of Intoxicating Beverages on Election Days.*  
(Enacting Clause.)

SECTION 1. It shall not be lawful for any person or persons keeping a public house, saloon, or drinking place, either licensed or unlicensed, to sell, give away, or furnish spirituous or malt liquors, wine, or any other intoxicating beverages, on any part of any day set apart, or to be set apart, for any general or special election, by the citizens, in any election district or precinct in any of the counties within the State, where an election is in progress, during the hours when by law in said district or precinct the election polls are required to be kept open.

SEC. 2. Any person or persons violating the provisions of this Act, shall be deemed guilty of a misdemeanor.

SEC. 3. This Act shall take effect from and after its passage. [Approved March 7, 1874.]

AMENDMENTS  
TO  
THE CIVIL CODE,  
ENACTED AT THE TWENTIETH LEGISLATIVE  
SESSION, 1873-4.

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UNLESS OTHERWISE STATED AT THE CLOSE OF THE SECTION, THESE  
AMENDMENTS TAKE EFFECT JULY 1st, 1874.

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13. Words are to be taken in their usual and popular sense. Appeal of Houghton, 42 Cal. 35.

14. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular; the word person includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration; and every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose;" signature or subscription includes mark, when the person cannot write, his name being written near it, and written by a person who

Words,  
what they  
include.



writes his own name as a witness. The following words also have in this Code the signification attached to them in this section, unless otherwise apparent from the context :

1. The word "property" includes property, real and personal ; Property.
2. The words "real property" are co-extensive with lands, tenements, and hereditaments ; Real property.
3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt ; Personal property.
4. The word "month" means a calendar month, unless otherwise expressed ; and, Month.
5. The word "will" includes codicils. Will.

15, 16, 17 of said Code are repealed.

19. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact. Constructive notice.

20. The repeal of an act repealing a former act does not revive the former act, or give it any force or effect ; to revive such former act it must be re-enacted. *People v. Hunt*, 41 Cal. 435.

28, 30, 31 of said Code are repealed.

33. A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control. Minor, disabilities of.

34. A minor may make any other contract than as above specified, in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this Title, and subject to the provisions of the Titles on marriage, and on master and servant. Minor, rights of.

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35. In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards ; or, in case of his death within that period, by his heirs or personal representatives ; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent.

Minor, disaffirmance of contract.

36. A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them.

Cannot disaffirm contract for necessities.

38. A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family.

Persons, without understanding, disabilities and liabilities of.

39. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the Chapter on Rescission of this Code. / 6 8-8

Contracts of insane subject to rescission.

47. A privileged publication is one made:

1. In the proper discharge of an official duty;  
2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law;

What publications are privileged.

3. In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;





4. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

A defamatory publication in a public journal, when not privileged. *Wilson v. Fitch*, 41 Cal. 363. See *Wyatt v. Buell*, Jan. T. 1874.

50. Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest.

Right to use force.

58. If either party to a marriage be incapable from physical causes of entering into the marriage state, or if the consent of either be obtained by fraud or force, the marriage is voidable.

Marriage, when voidable.

61. A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

Second marriage, when illegal and void.

1. The former marriage has been annulled or dissolved;

2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

62. Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein.

Release from marriage contract.



69. All persons about to be joined in marriage must first obtain a license therefor from the Clerk of the County Court of the county in which the marriage is to be celebrated, showing:

Marriage  
license,  
requisites  
of.

1. The identity of the parties;
2. Their real and full names and places of residence;
3. Their ages;

4. If the male be under the age of twenty-one, or the female under the age of eighteen years, the consent of the father, mother, or guardian, or of one having the charge of such person, if any such be given; or that such non-aged person has been previously, but is not at the time, married. For the purpose of ascertaining these facts, the Clerk is authorized to examine parties and witnesses on oath, and to receive affidavits, and he must state such facts in the license. If the male be under the age of twenty-one years, or the female be under the age of eighteen, and such person has not been previously married, no license shall be issued by the Clerk, unless the consent in writing of the parents of the person under age, or of one of such parents, or of his or her guardian, or of one having charge of such person, be presented to him; and such consent shall be filed by the Clerk.

72. The person solemnizing a marriage must first require the presentation of the marriage license; and if he has any reason to doubt the correctness of its statement of facts, he must first satisfy himself of its correctness, and for that purpose he may administer oaths and examine the parties and witnesses in like manner as the County Clerk does before issuing the license.

Requisites  
on solemn-  
ization of  
marriage.

73. The person solemnizing a marriage must make, sign, and indorse upon, or attach to, the license, a certificate, showing:

Certificate  
of marriage.

1. The fact, time, and place of solemnization; and
2. The names and places of residence of one or more witnesses to the ceremony.



76. If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration of such marriage, substantially showing :

Declaration of marriage, what to contain.

1. The names, ages, and residences of the parties;
2. The fact of marriage;
3. That no record of such marriage is known to exist. Such declaration must be subscribed by the parties and attested by at least three witnesses.

82. A marriage may be annulled for any of the following causes, existing at the time of the marriage :

Grounds for annulment of marriage.

1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife;

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force;

3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabit with the other as husband or wife;

4. That the consent of either party was obtained by fraud, unless such party afterward, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife;

5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife;

6. That either party was, at the time of marriage, physically incapable of entering into the married state, and such incapacity continues, and appears to be incurable.



**83.** An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods and by the parties as follows:

Action to obtain decree of nullity, when and by whom may be commenced.

1. For causes mentioned in subdivision one: by the party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian, or other person having charge of such non-aged male or female, at any time before such married minor has arrived at the age of legal consent;

2. For causes mentioned in subdivision two: by either party during the life of the other, or by such former husband or wife;

3. For causes mentioned in subdivision three: by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party;

4. For causes mentioned in subdivision four: by the party injured, within four years after the discovery of the facts constituting the fraud;

5. For causes mentioned in subdivision five: by the injured party, within four years after the marriage;

6. For causes mentioned in subdivision six: by the injured party, within four years after the marriage.

**90.** Marriage is dissolved only:

1. By the death of one of the parties, or,

2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties.

Marriage, how dissolved.

**91.** The effect of a judgment decreeing a divorce, is to restore the parties to the state of unmarried persons.

Divorce, effect of judgment.





92. Divorces may be granted for any of the following causes:

Grounds of  
action for  
divorce.

1. Adultery;
2. Extreme cruelty;
3. Willful desertion;
4. Willful neglect;
5. Habitual intemperance;
6. Conviction of felony.

100. Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation.

Separation,  
when be-  
comes de-  
sertion.

102. If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal.

Desertion,  
how cured.

Effect of re-  
fusing con-  
donation.

104. Where the wife's earnings are sufficient for her support, the neglect of the husband to provide is not a sufficient ground. *Rycraft v. Rycraft*, 42 Cal. 445.

118. Where the cause of divorce consists of a course of offensive conduct, or arises in cases of cruelty, from successive acts of ill-treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone.

Evidence of  
condona-  
tion.

119. In cases mentioned in the last section, condonation can be made only after the cause of divorce has become complete, as to the acts complained of.

Condonation,  
when  
can be  
made.



**123.** Condonation of a cause of divorce, shown in the answer as a recriminatory defense, is a bar to such defense, unless the condonation be revoked, as provided in section one hundred and twenty-one, or two years have elapsed after the condonation, and before the accruing or completion of the cause of divorce against which the recrimination is shown.

Condonation as a recriminatory defense.

**124.** A divorce must be denied:

1. When the cause is adultery, and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party; or,

Limitation of action for divorce.

2. When the cause is conviction of felony, and the action is not commenced before the expiration of two years after a pardon, or the termination of the period of sentence;

3. In all other cases when there is an unreasonable lapse of time before the commencement of the action.

**130.** No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee; but the Court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the Court, must be upon written questions and answers.

Divorce not granted by default, etc.

Sufficient corroboration of wife's evidence of adulterous intercourse of husband. *Evans v. Evans*, 41 Cal. 103.

**139.** Allowance for part support of child. *Wilson v. Wilson*, 45 Cal. 399.

**146.** In case of the dissolution of the marriage by the decree of a Court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows: If the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such pro-

Community property and homestead, how disposed of on divorce.



portions as the Court, from all the facts of the case, and the condition of the parties may deem just.

2. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties.

3. If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely, or for a limited period, subject in the latter case, to the future disposition of the Court, or it may, in the discretion of the Court, be divided, or be sold and the proceeds divided.

4. If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the Court to assign it for a limited period to the innocent party.

Effect of decree on homestead. *Shoemaker v. Chalfant*, January T. 1874.

147. The Court, in rendering a decree of divorce, must make such order for the disposition of the community property, and of the homestead, as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds.

Order of court for disposition of property.

In the case of divorce for adultery, or for extreme cruelty, held that the court should award to the injured party three fourths of the common property. *Eslinger v. Eslinger*, Oct. T. 1873.

148. The disposition of the community property, and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the Court.

Order subject to revision on appeal.

159. A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

How far may impair their legal obligations.



162. The Act of 1850 requires an instrument in writing, signed by the husband and wife, in case of sale or other alienation of a wife's separate property. *Gates v. Salmon*, July T. 1873.

If the husband purchases property with the separate property of the wife, the land purchased is the separate property of the wife. *Rich v. Tubbs*, 41 Cal. 34.

Gift from husband to wife. *Woods v. Whitney*, 42 Cal. 361. No legal presumption that conveyance to wife is fraudulent as to judgment creditors. *Hussey v. Castle*, 41 Cal. 239. Bargain and sale deed may be shown to be a deed of gift by parol. *Woods v. Whitney*, 42 Cal. 361.

Right of wife to proceeds on sale of her separate property. *Beaudry v. Felch*, Oct. T., 1873.

164. There is no legal presumption that land, separate property of husband, conveyed to wife in consideration of money, her separate property, becomes after conveyance community property. *Hussey v. Castle*, 41 Cal., 239.

The husband may purchase an estate, and pay for it out of common property, and cause it to be conveyed to the wife by deed of bargain and sale, and the transaction will operate as a gift to the wife. *Woods v. Whitney*, 42 Cal., 389. *Higgins v. Higgins*, Oct. T., 1873.

Property acquired by either spouse, under deed of bargain and sale, reciting a valuable consideration, is *prima facie* community property. *Harper v. Hamer*, Oct. T., 1873.

166. The filing of the inventory in the Recorder's office is notice and *prima facie* evidence of the title of the wife.

Filing inventory notice of wife's title and *prima facie* evidence.

167. The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband.

Community property, when not liable for contracts of wife.

Real property and personal property of wife distinguished, as to power of wife to create lien or incumbrance. *Maclay v. Love*, 25 Cal., 367; and *Love v. Watkins*, 40 Cal. 547, explained. *Terry v. Hammond*, Oct. T. 1873. Both husband and wife must join in sale of wife's personal property. *O'Brien v. Foreman*, April T. 1873.

172. The pendency of a suit for divorce does not interrupt husband's powers in relation to the sale of community property. *Lord v. Howe*, 43 Cal. 581,

173. Upon the dissolution of the community, by death of wife, one half the community property vests in her surviving children. *Broad v. Murray*, 44 Cal. 228.





**174.** If the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.

Husband  
liable for  
support of  
wife.

**175.** A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement.

When not  
liable.

**176.** The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property, and he is unable, from infirmity, to support himself.

When wife  
must sup-  
port hus-  
band.

**178.** Ante-nuptial verbal contract may be executed after marriage. *Hussey v. Castle*, 41 Cal. 239.

**194.** All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.

Legitimacy  
of children  
born after  
dissolution  
of marriage.

**197.** The father of a legitimate unmarried minor child is entitled to its custody, services, and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, unless she has deserted him, or is living separate from him by agreement. If the father be dead, or be unable, or refuse to take the custody, or has abandoned his family, the mother is entitled thereto.

Custody of  
legitimate  
child.

**210.** The law will not ordinarily imply a promise on the part of the father, unless circumstances show that it must have been the expectation of both parties that compensation should be given. *Friermuth v. Friermuth*, April T. 1873, citing *Andrews v. Foster*, 17 Vt. 556. *Dye v. Kerr*, 15 Barb. 444.



**212.** The wages of a minor employed in service may be paid to him until the parent or guardian entitled thereto gives the employer notice that he claims such wages.

Wages of minors.

**215.** A child born before wedlock becomes legitimate by the subsequent marriage of its parents.

Child legitimized by marriage of parents

**222.** The person adopting a child must be at least ten years older than the person adopted.

Who may adopt.

**223.** A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent.

Consent necessary.

**228.** A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards the other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.

Effect of adoption—Rights and duties.

**241.** A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing:

Appointment of guardian by will or by deed.

1. If the child be legitimate, by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent;

2. If the child be illegitimate, by the mother.

**243.** A guardian of the person or property, or both, of a person residing in this State, who is a minor, or of unsound mind, may be appointed in all cases, other than those named in section two hundred and forty-one, by the Probate Court, as provided in the Code of Civil Procedure.

Appointment by court.

The power of the Probate Court to appoint a guardian of an insane person is not defeated by the fact that such insane person is married. Guardianship of E. Fegan, 45 Cal. 176.



**246.** In awarding the custody of a minor, or in appointing a general guardian, the Court or officer is to be guided by the following considerations:

Rules for  
awarding  
custody of  
minor.

1. By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child be of a sufficient age to form an intelligent preference, the Court may consider that preference in determining the question.

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father.

3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows:

1. To a parent;

2. To one who was indicated by the wishes of a deceased parent;

3. To one who already stands in the position of a trustee of a fund to be applied to the child's support;

4. To a relative.

**249.** A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the Probate Court, but must, so far as it is in the power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward, at the close of his guardianship, in as good condition as he received it.

Duties of  
guardian of  
estate.

**251.** A guardian is but a representative of his ward. *Flege v. Garvey*, Jan. T. 1874.

Every alienation of the property of a ward, if made without an order of Court, is void. *DeLa Montagnie v. Union Ins. Co.*, 42 Cal. 291.

**253.** Removal of guardian. *Guardianship of Swift*, Jan. T. 1874.



**255.** The power of a guardian appointed by a Court is suspended only:

1. By order of the Court; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority; or,
3. The guardianship over the person of the ward, by the marriage of the ward.

Guardian appointed by court, how suspended.

**284.** Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the State; all other corporations are private.

Corporations public and private distinguished.

**285.** Private corporations may be formed by the voluntary association of any five or more persons, in the manner prescribed in this article. A majority of such persons must be residents of this State.

Private corporations, how formed

**286.** Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

Corporations may be formed for any lawful purpose.

**287.** Any corporation existing on the first day of January, one thousand eight hundred and seventy-three, formed under the laws of this State, and still existing, which has not already elected to continue its existence, under the provisions of this Code applicable thereto, may, at any time hereafter, make such election by the unanimous vote of all of its directors, or such election may be made at any annual meeting of the stockholders, or members, or at any meeting called by the Directors expressly for considering the subject, if voted by stockholders representing a majority of the capital stock, or by a majority of the members, or may be made by the Directors upon the written consent of that number of such stockholders or members. A certificate of the action of the Directors, signed by them and their Secretary, when the election is made by their unanimous vote, or upon the written consent of the stockholders or members, or a certificate of the proceedings of the meeting of the stockholders or members,

Continuance of existence under provisions of code.





when such election is made at any such meeting, signed by the chairman and secretary of the meeting, and a majority of the Directors, must be filed in the office of the Clerk of the county where the original articles of corporation are filed, and a certified copy thereof must be filed in the office of the Secretary of State: and thereafter the corporation shall continue its existence under the provisions of this Code which are applicable thereto, and shall possess all the rights and powers, and be subject to all the obligations, restrictions and limitations prescribed thereby.

**290.** Articles of incorporation must be prepared, setting forth :

Articles of  
incorpora-  
tion what to  
contain.

1. The name of the corporation ;
2. The purpose for which it is formed;
3. The place where its principal business is to be transacted ;
4. The term for which it is to exist, not exceeding fifty years ;
5. The number of its Directors, or Trustees, and the names and residences of such of them who are to serve until the election of such officers and their qualification ;
6. If there be a capital stock, its amount and the number of shares into which it is divided.

The use of an abbreviated corporate name by the officers of a corporation, organized under a particular name, is not a usurpation, nor will it support *quo warranto* to oust them from their franchise. *People v. Bogart*, 45 Cal. 73.

**292.** The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this State, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property.

Articles to  
be sub-  
scribed and  
acknowl-  
edged  
Number and  
qualifica-  
tion of  
signers.

**294.** Payment of the ten per cent., in checks, drawn against a sufficient fund, is sufficient. *People v. S. & V. R. R. Co.*, 45 Cal. 306; but otherwise, if drawn by one having no funds on deposit. *People v. Chambers*, 42 Cal. 201.



**295.** A substantial compliance with the statute is all that is required. *People v. S. & V. R. R. Co.*, 45 Cal. 306.

The statute is substantially complied with, if the only defect in the papers is the omission of the words, "in good faith," in that portion of the affidavit attached to the certificate relating to the payment of the ten per cent. *People v. S. & V. R. R. Co.*, 45 Cal. 306.

**296.** Upon filing the articles of incorporation in the office of the County Clerk of the county in which the principal business of the company is to be transacted, and a copy thereof, certified by the County Clerk, with the Secretary of State, and the affidavit mentioned in the last section, where such affidavit is required, the Secretary of State must issue to the corporation, over the great seal of the State, a certificate that a copy of the articles, containing the required statement of facts, has been filed in his office; and thereupon the persons signing the articles, and their associates and successors, shall be a body politic and corporate, by the name stated in the certificate, and for the term of fifty years, unless it is in the articles of incorporation otherwise stated or in this Code otherwise specially provided.

Articles to be filed with county clerk and secretary of state.

Certificate to issue.

Term of existence.

**297.** A copy of any articles of incorporation filed in pursuance of this Chapter, and certified by the Secretary of State, must be received in all the Courts and other places as *prima facie* evidence of the facts therein stated.

Certified copy of articles as *prima facie* evidence.

**299** of said Code is repealed.

**301.** Every corporation formed under this Title must, within one month after filing articles of incorporation, adopt a code of by-laws for its government not inconsistent with the constitution and laws of this State. The assent of stockholders representing a majority of all the subscribed capital stock, or of a majority of the members, if there be no capital stock, is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose; and in the event of such meeting being called, two weeks' notice of the same by advertisement in some newspaper published in the county in

Adoption of by-laws, when, how and by whom.



which the principal place of business of the corporation is located, or if none is published therein, then in a paper published in an adjoining county, must be given by order of the acting President. The written assent of the holders of two thirds of the stock, or of two thirds of the members, if there be no capital stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose.

**303.** A corporation may, by its by-laws, where no other provision is specially made, provide for :

By-laws, for what may provide.

1. The time, place, and manner of calling and conducting its meetings ;

2. The number of stockholders or members constituting a quorum ;

3. The mode of voting by proxy ;

4. The time of the annual election for Directors, and the mode and manner of giving notice thereof ;

5. The compensation and duties of officers ;

6. The manner of election and the tenure of office of all officers other than the Directors ; and

7. Suitable penalties for violations of by-laws, not exceeding, in any case, one hundred dollars for any one offense.

**304.** All by-laws adopted must be certified by a majority of the Directors and Secretary of the corporation, and copied in a legible hand in some book kept in the office of the corporation, to be known as the "Book of By-Laws," and no by-law shall take effect until so copied, and the book shall then be open to the inspection of the public during office hours of each day except holidays. The by-laws may be repealed or amended, or new by-laws may be adopted, at the annual meeting, or at any other meeting of the stockholders or members called for that purpose by the Directors, by a vote representing two thirds of the subscribed stock, or by two thirds of the members, or the power to repeal and amend the by-laws, and adopt new by-laws, may, by a similar vote at any such meeting, be delegated to the Board of

By-laws to be recorded in "Book of By-laws."

How repealed and amended.



**Directors.** The power when delegated may be revoked by a similar vote at any regular meeting of the stockholders or members. Whenever any amendment or new by-law is adopted, it shall be copied in the book of by-laws with the original by-laws, and immediately after them, and shall not take effect until so copied. If any by-law be repealed, the fact of repeal, with the date of the meeting at which the repeal was enacted shall be stated in the said book, and until so stated, the repeal shall not take effect.

**306.** At the first meeting at which the by-laws are adopted, or at such subsequent meeting as may be then designated, Directors must be elected, to hold their offices for one year, and until their successors are elected and qualified.

Directors to be elected at first meeting.

**307.** All elections of Directors must be by ballot, and a vote of stockholders representing a majority of the subscribed capital stock, or of a majority of the members, is necessary to a choice. If there be capital stock in the corporation, each stockholder is entitled to one vote for each share held by him at all such elections, and also at all elections at other meetings of stockholders.

Elections, how conducted.

Stock representation.

**309.** The prohibition contained in this section is directed against the trustees, and is designed to protect creditors as such, as well as stockholders. *Martin v. Zellerbach*, 38 Cal. 300.

Dividends may be paid in capital stock. *Harris v. S. F. Sugar Ref.* 41 Cal. 393.

**313.** The shares of stock of an estate of a minor, or insane person, may be represented by his guardian, and of a deceased person by his executor or administrator.

Stock of minors, insane or deceased how represented

**316.** Any officer of a corporation who willfully gives a certificate, or willfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, shall be liable for all the damages resulting therefrom to any

Officers liable for false certificates, reports or notices.





person injured thereby ; and if two or more officers unite or participate in the commission of any of the acts herein designated, they shall be jointly and severally liable.

**322.** Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the Court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt ; and if an action has been brought against him upon such debt, it shall be dismissed as to him upon his paying the costs, or such proportion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred ; and such liability is not released by any subsequent transfer of stock. The term "stockholder," as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another, and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor ; and also to every guardian or other trustee who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian or trustee shall not be liable under the provisions of this section by reason of any such in-

Stockhold-  
ers liable  
for debts,  
when  
released.

Liability  
how  
determined.



vestment, nor shall the person for whose benefit the investment is made be responsible in respect to the stock, until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment shall continue until that period. Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation, but the pledgor, or person, or estate represented, is to be deemed the stockholder as respects such liability. In corporations having no capital stock, each member is individually and personally liable for his proportion of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability as by this section may be brought against one or more stockholders, and similar judgments may be rendered.

Individual  
liability.

Stockholders are not sureties of a corporation, but the principal debtors. *Young v. Rosenbaum*, 39 Cal. 646; and their liability is not extinguished, suspended or merged by a judgment against the corporation. *Id.*

The release of a stockholder is a discharge of the corporation and other stockholders, to the same extent as the one to whom the release is executed. *Prince v. Lynch*, 38 Cal. 528.

Liability of members of plank or turnpike road company. *Blanchard v. Kaull*, 44 Cal. 440.

324. Word "trustee," after the name of a person to whom stock is transferred, is not notice of secret owners' equities. *Brewster v. Sime*, 42 Cal. 139.

Owner is bound by acts of "trustee." *Id.*

326. When the shares of stock in a corporation are owned by parties residing out of the State, the President, Secretary, or Directors of the corporation, before entering any transfer of the shares on its books, or issuing a certificate therefor, to the transferee, may require from the attorney or agent of the non-resident owner, or from the person claiming under the transfer, an affidavit or other evidence that the non-resident

Non-resi-  
dent stock-  
holders.



owner was alive at the date of the transfer, and if such affidavit or other satisfactory evidence be not furnished, may require from the attorney, agent or claimant, a bond of indemnity, with two sureties, satisfactory to the officers of the corporation, or if not so satisfactory, then one approved by a District Judge, or the County Judge of the county in which the principal office of the corporation is situated, conditioned to protect the corporation against any liability to the legal representatives of the owner of the shares, in case of his or her death before the transfer; and if such affidavit or other evidence or bond be not furnished when required, as herein provided, neither the corporation, nor any officer thereof, shall be liable for refusing to enter the transfer on the books of the corporation.

Bond of  
indemnity.

331. The Directors of any corporation formed or existing under the laws of this State, after one fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent provided herein.

Directors  
may levy as-  
sessments.

336. The notice must be personally served upon each stockholder, or, in lieu of personal service, must be sent through the mail, addressed to each stockholder at his place of residence, if known, and if not known, at the place where the principal office of the corporation is situated, and be published once a week, for four successive weeks, in some newspaper of general circulation and devoted to the publication of general news, published at the place designated in the articles of incorporation as the principal place of business, and also in some newspaper published in the county in which the works of the corporation are situated, if a paper be published therein. If the works of the corporation are not within a State or Territory of the United States, publication in a paper of the place where they are situated is not necessary. If there be no newspaper

Service and  
publication  
of notice.



published at the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, if there be one, and if there be none, then in a newspaper published in an adjoining county.

**348.** The publication of notice required by this Article, may be proved by the affidavit of the printer, foreman, or principal clerk of the newspaper in which the same was published; and the affidavit of the Secretary or auctioneer is *prima facie* evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom, and for what price, and of the fact of the purchase money being paid. The affidavits must be filed in the office of the corporation, and copies of the same, certified by the Secretary thereof, are *prima facie* evidence of the facts therein stated. Certificates signed by the Secretary and under the seal of the corporation, are *prima facie* evidence of the contents thereof.

Publication  
how proved.

Affidavit of  
sale.

To be filed.

**354.** Although an act denominates companies which may be formed under its provisions, "joint stock companies," still they may be clothed with powers, rights, and liabilities of corporations. *Blanchard v Kaull*, 44 Cal. 440.

**358.** Question discussed as to what is the commencement of corporate business, within one year after filing certificate. *People v. S. & V. R. R. Co.*, 45 Cal. 306.

**359.** Every corporation may increase or diminish its capital stock at a meeting called for that purpose by the Directors, as follows:

Increasing  
and dimin-  
ishing capi-  
tal stock.

1. Notice of the time and place of the meeting, stating its object and the amount to which it is proposed to increase or diminish the capital stock, must be personally served on each stockholder resident in the State, at his place of residence, if known, and if not known, at the place where the principal office of the corporation is situated, and be published in a newspaper published in the county of such principal place of business, once a week, for four weeks successively.





2. The capital stock must in no case be diminished . to an amount less than the indebtedness of the corporation, or the estimated cost of the works which it may be the purpose of the corporation to construct.

3. At least two thirds of the entire capital stock must be represented by the vote in favor of the increase or diminution, before it can be effected.

4. A certificate must be signed by the Chairman and Secretary of the meeting, and a majority of the Directors, showing a compliance with the requirements of this section, the amount to which the capital stock has been increased or diminished, the amount of stock represented at the meeting, and the vote by which the object was accomplished.

5. The certificate must be filed in the office of the County Clerk where the original articles of incorporation were filed, and a certified copy thereof in the office of the Secretary of State, and thereupon the capital stock shall be so increased or diminished.

6. The written assent of the holders of three fourths of the subscribed capital stock shall be as effectual to authorize the increase or diminution of the capital stock, as if a meeting were called and held; and upon such written assent, the Directors may proceed to make the certificate herein provided for.

**360.** No corporation shall acquire or hold any more real property than may be reasonably necessary for the transaction of its business, or the construction of its works, except as otherwise specially provided. A corporation may acquire real property, as provided in Title VII, Part III, Code of Civil Procedure, when needed for any of the uses and purposes mentioned in said Title.

Acquisition  
of real prop-  
erty.

The ownership of property is not essential to the existence of a corporation. *Sullivan v. Triunfo G. and S. M. Co.*, 39 Cal. 459.



**388.** For the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof may be levied upon and sold under execution, in the same manner and with like effect as any other property.

Franchise  
may be sold  
under exe-  
cution.

The sale of property, under a judgment recovered against the individual members, in an action to which the company was not a party, passes no title. *Bracia v. Nelson*, 42 Cal. 107.

**393.** The sale of any franchise under execution must be made in the county in which the corporation has its principal place of business, or in which the property, or some portion thereof, upon which the taxes are paid, is situated.

Sale, under  
execution,  
where.

**401.** Every corporation formed for a period less than fifty years may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding fifty years from its formation. Such extension may be made at any meeting of the stockholders or members, called by the Directors expressly for considering the subject, if voted by stockholders representing two thirds of the capital stock; or by two thirds of the members; or may be made upon the written assent of that number of stockholders or members. A certificate of the proceedings of the meeting upon such vote, or upon such assent, shall be signed by the Chairman and Secretary of the meeting and a majority of the Directors, and be filed in the office of the County Clerk, where the original articles of incorporation were filed, and a certified copy thereof in the office of the Secretary of State, and thereupon the term of the corporation shall be extended for the specified period.

May extend,  
term of ex-  
istence.

Certificate  
to be filed.

**402** of said Code is repealed.



**419.** No company, corporation, or association, except mutual life, health, and accident corporations, shall hereafter be formed or organized, under the laws of this State, for the transaction of business in any kind of insurance, except on live stock, without a subscribed capital equal to at least two hundred thousand dollars in United States gold coin ; twenty-five per cent whereof must be paid in previous to the issuance of any policy, and the residue by monthly or quarterly installments, within twelve months from the day of filing the certificate of incorporation. No individual, or person, or corporation, organized under the laws of any other State or country as a stock company, must transact any kind of insurance business in this State, except on live stock, unless such person or corporation has a paid up capital stock equal to at least two hundred thousand dollars in United States gold coin, and has available cash assets, exclusive of stock notes, equal to two hundred thousand dollars in such gold coin over and above all liabilities for losses, reported expenses, taxes, and reinsurance of all outstanding risks, as provided in section six hundred and two of the Political Code of this State. Nor must any individual or person, as agent of any person or corporation, organized under the laws of any other State or country as a mutual insurance company, transact any kind of insurance business in this State, except on live stock, unless such person or corporation possess available cash assets equal to at least two hundred thousand dollars in United States gold coin, over and above all liabilities for losses reported, expenses, taxes, and reinsurance of all outstanding risks, as provided in section six hundred and two of the Political Code of this State.

Capital  
must be at  
least two  
hundred  
thousand  
dollars.

**427.** Every fire and marine insurance corporation may, by its Board of Directors, or as the by-laws direct, invest its funds in loans upon real or personal property, or in the purchase of stocks, bonds or other

Funds may  
be invested,  
how.



securities, but no loan must be made on the stock of the corporation, or on the notes or obligations of any of its stockholders.

**428.** Fire and marine insurance corporations must never take, on any one risk, whether it is a marine insurance or an insurance against fire, a sum exceeding one tenth part of their capital actually paid in, and intact at the time of taking such risk, without reinsuring the excess above one tenth.

Risk, limitation of.

**441.** Until the Guarantee Fund is discharged from its obligations, as provided in the preceding section, no note must be withdrawn from the Fund, unless another note of equal solvency is substituted therefor, with the approval of the Board of Directors. The corporation must allow a commission, not exceeding five per cent. per annum, on all such guarantee notes while outstanding, and also interest on all moneys paid on such notes by the parties liable thereon, at the rate of twelve per cent. per annum, payable half yearly until repaid by the corporation, unless the current rate of interest is different from this amount, in which case the rate payable may, from time to time, at intervals of not less than one year, be increased or reduced by the Board of Directors, so as to conform to the current rate.

Guaranty notes and interest, how disposed of.

**444.** Life, health, and accident insurance corporations may invest their capital stock as follows:

Investment of capital stock, on what securities.

1. In loans upon unincumbered and improved real property within the State of California, which shall be worth at the time of the investment at least forty per cent. more than the sum loaned ;

2. In the purchase of or loans upon interest-bearing bonds, and other securities of the United States and of the State of California ;

3. In the purchase of or loans upon interest-bearing bonds of any of the other States of the Union, or of any county, or incorporated city, or city and county in the State of California ;





4. In the purchase of loans upon any stocks of corporations formed under the laws of this State, except of mining corporations, which shall have, at the time of the investment, a value, in the city and county of San Francisco, of not less than sixty per cent. of their par value, and shall be rated as first-class securities ; but no loans shall be made on any securities specified in subdivisions three and four of this section, in any amount beyond sixty per cent. of the market value of the securities, nor shall any loan be made on the stock of the corporation, or notes or other obligations of its corporators.

447. Every life insurance corporation organized under the laws of this State must, on or before the first day of February of each year, furnish the Insurance Commissioner the necessary data for determining the valuation of all its policies outstanding on the thirty-first day of December then next preceding. And every life insurance company organized under the laws of any other State or country, and doing business in this State, must, upon the written requisition of the Commissioner, furnish him, at such time as he may designate, the requisite data for determining the valuation of all of its policies then outstanding. Such valuations must be based upon the rate of mortality established by the American experience life-table and interest at four and one half per cent. per annum. For the purpose of making the valuations, the Insurance Commissioner is authorized to employ a competent actuary, whose compensation for such valuations shall be three cents for each thousand dollars of insurance ; to be paid by the respective companies whose policies are thus valued.

Insurance commissioner to be furnished with valuation of policies outstanding.

Actuary may be employed.

449. When the certificate of the Insurance Commissioner of this State, of the valuation of the policies of a life insurance company, as provided in section four hundred and forty-seven of the Civil Code of this State, issued to any company organized under the laws of this State, shall not be accepted by the insurance authorities

Valuation of policies, retaliatory provision.



of any other State, in lieu of a valuation of the same, by the insurance officer of such other State, then every company organized under the laws of such other State, doing business in this State, shall be required to have a separate valuation of its policies made under the authority of the Insurance Commissioner of this State, as provided in section four hundred and forty-seven of the Civil Code.

**450.** Every policy of insurance upon life issued hereafter within the limits of the State of California, whether by a person or corporation, organized under the laws of this State, or under those of any other State or country, or by the agent of such person or corporation, must contain written evidence that it was issued in this State. And any such policy issued in this State, which shall not contain such written evidence, is at the option of the holder null and void. And the person or corporation issuing such policy, without the evidence hereinbefore required, shall forfeit to the people of the State of California, for each and every policy so issued, the sum of one hundred dollars in United States gold coin, to be collected by the Insurance Commissioner, as provided by section five hundred and ninety-eight of the Political Code.

Policy, to contain what evidence.

Penalty.

**451.** Whenever, during the life of any policy of insurance hereafter issued in this State, such policy shall be, by the legal holder thereof, presented to the person or corporation issuing the same, or to the agent of such person or corporation, for payment and cancellation, such person or corporation must, within sixty days after such presentation and demand of payment, pay to the holder of such policy, in like currency to that of the policy, a sum equal to seventy-five per cent. of the then present value of such policy, as ascertained and determined in accordance with the provisions of section four hundred and forty-seven of the Civil Code, and such payment shall be a full and complete liquidation of such policy. [Approved March 30th, 1874.]

Payment and cancellation of policy.



**485.** The neglect of the company to build a fence does not operate to dispossess the occupant of his entire field. *McCoy v. Cal. P. R. Co.*, 40 Cal. 532.

**486.** Liability for negligence of its agent. *Taylor v. W. P. R. R. Co.*, 45 Cal. 323.

**491.** All railroads, other than street railroads and those used exclusively for carrying freight or for mining purposes, built by corporations organized under this chapter, must be constructed of the best quality of iron or steel rails, known as the T or H rail, or other pattern of equal utility.

Character  
of iron rail  
to be used.

**498.** The city or town authorities, in granting the right of way to street railroad corporations, in addition to the restrictions which they are authorized to impose, must require a strict compliance with the following conditions:

Conditions,  
on grant of  
right of  
way.

1. To construct their tracks on those portions of streets designated in the ordinance granting the right, which must be as nearly as possible in the middle thereof;

2. To plank, pave and macadamize the entire length of the street used by their track, between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street, and with good crossings;

3. That the tracks must not be more than five feet wide within the rails, and must have a space between them sufficient to allow the cars to pass each other freely.

A street railroad has only an equal right, with the traveling public, to the use of the street where its track is laid. *Shea v. P. & B. V. R. Co.*, 44 Cal. 414.

**499.** Grant by City Council not exclusive. *O. R. R. Co. v. O. B. & F. V. R. R. Co.*, 45 Cal. 365.



505. Every street railroad corporation must provide, and, on request, furnish to all persons desiring a passage on its cars, any required quantity of passenger tickets or checks, each to be good for one ride. Any corporation failing to provide and furnish tickets or checks to any person desiring to purchase the same at not exceeding the rate hereinbefore prescribed, shall forfeit to such person the sum of two hundred dollars, to be recovered as provided in the preceding section.

To provide and furnish passenger tickets.

Penalty.

506. Upon the trial of an action for any of the sums forfeited, as provided in the two preceding sections, proof that the person demanding or receiving the money as fare, or for the sale of the ticket or check, was at the time of making the demand or receiving the money, engaged in an office of the corporation, or vehicle belonging to the corporation, shall be *prima facie* evidence that such person was the agent, servant, or employé of the corporation, to receive the money and give the ticket or check mentioned.

Prima facie evidence of agency.

507. In every grant to construct street railroads, the right to grade, sewer, pave, macadamize, or otherwise improve, alter, or repair the streets or highways, is reserved to the corporation, and cannot be alienated or impaired; such work to be done so as to obstruct the railroad as little as possible; and, if required, the corporation must shift its rails so as to avoid the obstructions made thereby.

Rights reserved to city or town.

510. Street railroads are governed by the provisions of Title III of this Part, so far as they are applicable, unless such railroads are therein specially excepted.

What provisions of Title III are applicable to street railroads.

512. Where a corporation is formed for the construction and maintenance of a wagon road, the road must be laid out as follows :

Three Commissioners must act in conjunction with the surveyor of the corporation, two to be appointed by the Board of Supervisors of the county through

Three commissioners to act with surveyor.





which the road is to run, and one by the corporation, who must lay out the proposed road and report their proceedings, together with the map of the road, to the Supervisors, as provided in the succeeding section.

**514.** All wagon road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair. They may take such tolls only on their roads, ferries or bridges, as are fixed by the Board of Supervisors of the proper county through which the road passes, or in which the ferry or bridge is situate, except that in the counties of Klamath, Butte, Del Norte, Plumas, Humboldt and Sierra, the Directors may fix their own tolls; but in no case must the tolls be more than sufficient to pay fifteen per cent. nor less than ten per cent. per annum on the cost of construction, after paying for repairs and other expenses for attending to the roads, bridges or ferries. If tolls, other than as herein provided, are charged or demanded, the corporation forfeits its franchise and must pay to the party so charged one hundred dollars as liquidated damages. [Approved March 28, 1874. Sixty days.]

Tolls, etc.,  
to be col-  
lected.

Penalty for  
taking un-  
lawful tolls.

**521.** The entire revenue from the road shall be appropriated: first, to repayment to the corporation of the costs of its construction, together with the incidental expenses incurred in collecting tolls and keeping the road in repair; and, second, to the payment of the dividend among its stockholders, as provided in section five hundred and fourteen. When the repayment of the cost of construction is completed, the tolls must be so reduced as to raise no more than an amount sufficient to pay said dividend, and incidental expenses, and to keep the road in good repair.

Revenue,  
how to be  
appropri-  
ated.

Tolls, to be  
reduced  
when.

**528.** Power of Supervisors to modify rates of toll. *Stanislaus Bridge Co. v. Horseley*, April T. 1873.

**541** of said Code is repealed.



**549.** All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The rates to be charged for water must be determined by Commissioners, to be selected as follows: two by the city and county or city or town authorities, or when there are no city or town authorities, by the Board of Supervisors of the county, and two by the water company; and in case a majority cannot agree to the valuation, the four Commissioners must choose a fifth Commissioner; if they cannot agree upon a fifth, then the County Judge of the county must appoint such fifth person. The decision of the majority of the Commissioners shall determine the rates to be charged for water for one year, and until new rates are established. The Board of Supervisors, or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State.

Duties of  
water cor-  
porations.

Rates fixed  
by commis-  
sioners.

**Sec. 566—Note:**

*An Act supplementary to an Act entitled an Act to authorize the formation of Corporations to provide the Members thereof with Homesteads, or Lots of Land suitable for Homesteads, approved May twentieth, eighteen hundred and sixty-one.*

**SECTION 1.** Any corporation formed under the Act to which this Act is supplemental, whose period of existence is not stated in its articles of incorporation to be ten years, may continue its corporate existence for ten years from the date of filing its articles of incorporation, upon complying with the provisions of this Act.

**SEC. 2.** Any such corporation existing on the first day of January, eighteen hundred and seventy-four, may, at any time before its period of existence, as stated in its articles of incorporation, shall expire, continue its existence, as stated in section one of this Act, by a majority vote of its Board of Trustees at any meeting of such Board, or by a vote of a majority of the stockholders as the Board of Trustees may elect. A certificate of the action of the Directors, signed by them and their Secretary, when the election is made by their vote, or upon the written consent of the stockholders or members, or a certificate of the proceedings of the meeting of the stockholders or members, when





such election is made at any such meeting, signed by the Chairman and Secretary of the meeting and a majority of the Directors, must be filed in the office of the Clerk of the county where the original articles of incorporation are filed, and a certified copy thereof must be filed in the office of the Secretary of State ; and thereafter the corporation shall continue its existence under the provisions of this Act, and shall possess all the rights and powers, and be subject to all the obligations, restrictions, and limitations prescribed by the Act of which this is supplementary. Sec. 3. This Act shall take effect from and after its passage. [Approved March 23, 1874.]

Property  
which may  
be owned,  
and how  
disposed of.

574. Savings and loan corporations may purchase, hold and convey real and personal property, as follows:

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed one hundred thousand dollars; except, on a vote of two thirds of the stockholders, the corporation may increase the sum to an amount not exceeding two hundred and fifty thousand dollars;

2. Such as may have been mortgaged, pledged, or conveyed to it in trust, for its benefit in good faith, for money loaned in pursuance of the regular business of the corporation;

3. Such as may have been purchased at sales under pledges, mortgages, or deeds of trust made for its benefit, for money so loaned, and such as may be conveyed to it by borrowers in satisfaction and discharge of loans made thereon;

Restrictions  
in purcha-  
ses as provi-  
ded above.

4. No such corporation must purchase, hold, or convey real estate in any other case or for any other purpose; and all real estate described in subdivision three of this section, must be sold by the corporation within five years after the title thereto is vested in it by purchase or otherwise;

5. No corporation must purchase, own, or sell personal property, except such as may be requisite for its immediate accommodation for the convenient transaction of its business, mortgages on real estate, bonds, securities or evidences of indebtedness, public or private, gold and silver bullion, and United States Mint certificates of ascertained value, and evidences of debt issued by the United States;

6. No corporation must purchase, hold, or convey bonds, securities, or evidences of indebtedness, public or private, except bonds of the United States, of the State of California, and of the counties, cities, or cities and counties, or towns of the State of California, unless such corporation has a capital stock or reserved fund paid in, of not less than \$300,000. [Approved March 18th, 1874. Immediate effect.]

**Sec. 587—Note:**

*AN ACT for the Better Protection of the Stockholders in Corporations formed under the Laws of the State of California, for the purpose of Carrying on and Conducting the Business of Mining.*

**SECTION 1.** It shall be the duty of the Secretary of every corporation formed under the laws of the State of California, for the purpose of mining, to keep the books of such corporation, as prescribed by its by-laws, provided such by-laws are not inconsistent with the laws of this State.

The books of such corporation shall be produced for examination and inspection during the hours of business, every day in the year, Sundays and legal holidays excepted, upon the demand of any stockholder, holding and presenting a certificate of stock in such corporation, either in his own name and properly endorsed; and the Secretary of such corporation shall be required upon the demand of any stockholder holding stock in such corporation, to the amount of five hundred dollars, par value, to have the books of the corporation written up at the end of each month, and shall make out a balance sheet showing the correct financial condition of the corporation, and on or before the 10th day of January and July of each year, he shall make out a written statement, showing all the business and financial transactions of the corporation for the six months preceding, which statement shall also contain a full description of all property of the corporation, and the character and extent of the same, and such statements, together with all papers and records of the corporation shall be open to examination and inspection upon any demand by such stockholder. All demands of stockholders, as specified in this section, shall be made to the Secretary, at the office of the corporation, where its principal place of business is located.

**SEC. 2.** Any owner of stock, of the par value of \$500, in any of the corporations mentioned in section one of this Act, shall at all hours of business or labor on or about the premises or property of such corporation, have the right to enter upon such property and examine the same, either on the surface or under ground. And it is hereby made the duty of any and all officers, managers, agents, superintendents, or persons in charge, to allow any such stockholder to enter upon and examine any of the property of such corporation, at any time during the hours of business or labor. And the presentations of certificates of stock in the







corporation of the par value of \$500, to the officer or person in charge, shall be *prima facie* evidence of ownership and right to enter upon or into, and make examination of the property of the corporation.

SEC. 3. The violations of any of the provisions of sections one and two of this Act, shall subject the Trustees of the corporation to a fine of two hundred dollars and costs of suit, and the expenses of the stockholders so refused, in traveling to and from the property, which may be recovered in any Court of competent jurisdiction, either in the county where the property is situated, or in the county where the office and principal place of business of the corporation is situated, which said fine shall be imposed and collected for, and paid over to the person so refused, together with all moneys collected for the said traveling expenses.

SEC. 4. All Acts in conflict with the provisions of this Act are hereby repealed.

Corporations, by order of district court, may mortgage or sell real estate.

598. Corporations of the character mentioned in section five hundred and ninety-three, may mortgage or sell real property held by them, upon obtaining an order for that purpose from the District Court held in the county in which the property is situated. Before making the order, proof must be made to the satisfaction of the Court that notice of the application for leave to mortgage or sell has been given by publication in such manner and for such time as the Court or Judge has directed, and that it is for the interest of the corporation that leave should be granted as prayed for. The application must be made by petition, and any member of the corporation may oppose the granting of the order by affidavit or otherwise.

**Sec. 601—Note:**

*An Act relating to Mutual Beneficial and Relief Associations.*

SECTION 1. Associations may be formed for the purpose of paying to the nominee of any member, a sum upon the death of said member, not exceeding three dollars for each member of such association. No such association shall exceed in number one thousand persons.

SEC. 2. Such association shall be formed by filing a verified certificate in the office of the Clerk of the county in which the principal place of business shall be situated, and filing a like certificate in the office of the Secretary of the State; such certificate shall state the general objects of the association, its principal place of business, and the names of the officers selected to hold office for the first three months, and shall be signed by said officers, and verified by at least three of them.

**Sec. 3.** Said associations, upon the death of each member, may levy an assessment upon each member living at the time of the death, not exceeding three dollars for each member, and collect the same, and pay the same to the nominee of such deceased; and may also provide the payment of such annual payments of members as may be deemed best. Such annual assessment upon any one member not to be raised above the annual assessment established at the time such member joined such association.

**Sec. 4.** Such association, by its name, may sue and be sued, and may loan such funds as it may have on hand, and may own sufficient real estate for its business purposes, and such other real estate as it may be necessary to purchase on foreclosure of its mortgages; *provided*, such real estate so obtained through foreclosure shall be sold and conveyed within five years from the day title is obtained, unless the District Court of the proper district shall, upon petition and good cause shown, extend the time.

**Sec. 5.** Such association may make such by-laws, not inconsistent with the laws of this State, as may be necessary for its government, and for the transaction of its business, and shall not be subject to the provisions of the general insurance laws.

**Sec. 6.** All associations heretofore formed for the objects contemplated by this Act, and now in operation, may avail themselves of its provisions by filing the certificate provided for in Section 1; *provided*, that such society shall not have greater membership than three thousand.  
[Approved March 28th, 1874. Immediate in effect.]

**639.** Corporations organized for the erection of buildings and making other improvements on real property, may raise funds in shares not exceeding two hundred dollars each, payable in periodical installments. Such bodies are known as land and building corporations, and may be organized with or without a capital stock.

How organized.

**646 and 648** of said Code are repealed.

**660.** *Gett v. McManus*, Oct. T. 1873.

**670.** The State is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tide-water within the State; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated to the State, and of all property of which there is no other owner.

Property of State

Object of Congress in granting swamp lands to State, and obligations of State in accepting grant. *Kimball v. Reclamation Fund Commissioners*, 45 Cal. 344. See generally *Carpenter v. Sargent*, 41 Cal. 557; *Hinckley v. Fowler*, 43 Cal. 59; *Maller v. Taylor*, 45 Cal. 219.





Who may own property.

**671.** Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State.

**683.** By the provisions of the Homestead Act, there is a joint estate in the homestead, which can only be divested by the concurrent act of both husband and wife. *Barber v. Babel*, 36 Cal. 11.

**685.** Grantee of a specific quantity in a larger tract becomes a tenant in common. *Lawrence v. Ballou*, 37 Cal. 518. *Gates v. Salmon*, July T. 1873.

So, a purchaser at execution sale of the interest of a partner becomes a tenant in common. *McCauley v. Fulton*, 44 Cal. 356.

Tenants in common hold by unity of possession, and each has a right to occupy the whole and every part thereof. *Tevie v. Hicks*, 38 Cal. 234. As against every one except his co-tenant. *Williams v. Sutton*, 43 Cal. 65.

A tenant in common cannot assail the common title. *Bornheimer v. Baldwin*, 42 Cal. 27.

Conditions restraining marriage, are void.

**710.** Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage.

Law governing real property.

**755.** Real property within this State is governed by the law of this State, except where the title is in the United States.

Estates in fee.

**762.** Every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee simple, or an absolute fee.

Estate for life of a third person, a freehold.

**766.** An estate, during the life of a third person, whether limited to heirs or otherwise, is a freehold.

**768.** The right to an estate in reversion becomes absolute on the happening of the event which terminates the intermediate estate. *Hawes v. Lathrop*, 38 Cal. 493.

Limitations of chattels real.

**770.** The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

**774.** Successive estates for life cannot be limited, except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of those persons the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created.

Limitation  
of succe-  
sive estates  
for life.

**775.** No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee; nor can a remainder be created upon such estate in a term for years, unless it is for the whole residue of such term.

Remainder  
upon estates  
for life or  
term of  
years.

**801.** When two fields are adjacent, and one is lower than the other, the owner of the upper field has a natural easement for the water-flow from his land. *Ogburn v. Connor*, July T. 1873.

In order to maintain a right of way, by parol license, as against the purchaser, from one who gave the license, the one claiming the right of way must show a right based on prescription. *Barbour v. Pierce*, 42 Cal. 657.

The right of way over private lands for a road does not vest in the public till the owner has been paid or tendered his damages. *Brady v. Bronson*, 45 Cal. 640.

To acquire a prescriptive right to overflow the lands of another, there must have been an uninterrupted enjoyment, under claim of right, for five years, an actual occupation by the flow of water, and such as to occasion damage, sufficient to raise the presumption that the owner would not have submitted to it, unless the other party had acquired the right. *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396.

Adverse use by ditch owners for five years gives right to an easement by prescription. *Campbell v. West*, 44 Cal. 646.

Prescription or adverse use cannot ripen into a title as against the United States. *Matthews v. Ferrea*, 45 Cal. 51.

Whether the grant of a right of way be in gross, or appurtenant to some other estate, must be determined from the grant itself, and not from matters *aliunde*. *Wagner v. Hanna*, 38 Cal. 111.

Where the right of way was secured by contract, the owner must look for compensation to his contract, in case of condemnation. *W. P. R. R. Co. v. Reed*, 35 Cal. 621.

Distinction between an easement and a right of way in gross. *Wagner v. Hanna*, 38 Cal. 111.

The grant of an easement is always made for the benefit of other premises described in the grant. *Id.*

The presumption of the grant of an easement, when indulged against a proper party, is because his conduct in submitting to the use for such length of time without objections, cannot be accounted for upon any other hypothesis. *Hanson v. McCue*, 42 Cal. 305; *Wilkins v. McCue*, Oct. T. 1873.





**Abstract**

Servitudes  
not attached  
to land.

802. The following land burdens, or servitudes upon land, may be granted and held, though not attached to land:

1. The right to pasture, and of fishing and taking game;
2. The right of a seat in church;
3. The right of burial;
4. The right of taking rents and tolls;
5. The right of way;
6. The right of taking water, wood, minerals, or other things.

Liability of  
assignee of  
lessee.

822. Whatever remedies the lessor of any real property [has] against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assignees of the lessee, for any cause of action accruing while they are such assignees, except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises.

Terms of  
lease may  
be changed  
by notice.

827. In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least fifteen days before the expiration of the month, change the terms of the lease, to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rent, and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month.

The mode of changing the terms of a lease, upon notice by the landlord, depends wholly upon the statute, and the cases in which such changes can be made are limited to those in which it is expressly authorized. *Stoppelkamp v. Mangiot*, 42 Cal. 317.

**829.** Percolating waters belong to the owner of the soil. *Hanson v. McCue*, 42 Cal. 307.

**830.** Except where the grant under which land is held indicates a different intent, the owner of the up-land, when it borders on tide water, takes to ordinary high water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

Boundaries by water.

Land bounded by the sea shore extends only to the high tide line. *Moore v. Massini*, 37 Cal. 432.

**832.** Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjacent land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations.

Lateral and subjacent support, right of owner to excavate.

**848, 849, 850, 851** of said Code are repealed.

**853.** When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

Resulting trust, when presumed.

Resulting trusts. *Case v. Coddington*, 38 Cal. 191. *Dikeman v. Norrie*, 36 Cal. 94. *Roberts v. Ware*, 40 Cal. 634. *Slattery v. Hall*, 43 Cal. 193. *Poppe v. Athearn*, 42 Cal. 607.

**854, 855** of said Code are repealed.

**857.** Express trusts may be created for any of the following purposes:

Express trusts, for what purposes created.

1. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust;

2. To mortgage or lease real property for the benefit





of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of Title II of this Part; or,

4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same Title.

Express trusts. *Miles v. Thorne*, 38 Cal. 335. *Hearst v. Pajol*, 44 Cal. 230.

Powers,  
when  
deemed part  
of the secu-  
rity.

**858.** Where a power to sell real property is given to a mortgagee, or other incumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded.

Powers,  
execution  
of.

**860.** Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.

Powers in trust. *Hathaway v. Patterson*, 45 Cal. 294; *Howman v. Vallejo*, 45 Cal. 564.

Constructive trust. *Wasley v. Foreman*, 33 Cal. 90; *Scott v. Umbarger*, 41 Cal. 410; *King v. Wise*, 43 Cal. 629.

**861, 862** of said Code are repealed.

Beneficiary  
may be  
restrained  
from dispo-  
sing of  
interest.

**867.** The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust.

868 of said Code is repealed.

869. Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, or in an instrument signed by him, and recorded in the same office with the grant to the trustee, such grant must be deemed absolute in favor of purchasers from such trustee without notice, and for a valuable consideration.

Express trust when deemed absolute grant in favor of purchasers from trustees.

Title V, of Part II, of Division II, on Powers of the Civil Code, embracing sections of said Code from Sec. 878 to 946, inclusive, is repealed.

900. When conveyance, by one of two trustees, conveys no title. *Learned v. Wilson*, 40 Cal. 349.

947 of said Code is repealed.

953. A thing in action is a right to recover money or other personal property by a judicial proceeding.

Thing in action defined.

960. The term ship, or shipping, when used in this Code, includes steamboats, sailing vessels, canal boats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons.

Ship, shipping terms defined.

991. One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade mark, any form, symbol, or name, which has not been so appropriated by another, to designate the origin or ownership thereof, but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the thing is carried on.

Trade mark, what may be appropriated.

A trade mark is a word or device, used by the manufacturer or vendor of goods, to designate origin or ownership. *Burke v. Cassin*, 45 Cal. 467.







1007. To acquire title to land by adverse possession, it must appear that the party was in the adverse possession for the period required to bar the plaintiff's right of action. *Raimond v. Eldridge*, 43 Cal. 506; *Hayes v. Martin*, 45 Cal. 559; *Grimm v. Curley*, 43 Cal. 251.

With claim of title during the entire statutory period. *Lovell v. Frost*, 44 Cal. 471.

The possession essential must be actual. *San Francisco v. Fulde*, 37 Cal. 349; *Thompson v. Pioche*, 44 Cal. 508, and continuous; *San Francisco v. Fulde*, 37 Cal. 349; *People v. Klumpke*, 41 Cal. 263; *San Jose v. Tumble*, 41 Cal. 536.

Title to water by prescription. *Wilkins v. McCue*, Oct. T. 1873.

Fixtures.

1013. When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it.

Owners of the fee are owners of the improvements and fixtures actually annexed to the soil. *United States v. Certain Land*, Jan. T. 1874.

1014. A party as riparian owner cannot be protected as to accretions to his land which are not in existence, and which may or may not exist in future. *Taylor v. Underhill*, 40 Cal. 471.

What fixtures tenant may remove.

1019. A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises.

Transfer, grant defined.

1053. A transfer in writing is called a grant, or conveyance, or bill of sale. The term "grant," in this and the next two Articles, includes all these instruments, unless it is specially applied to real property.

1060 of said Code is repealed.

Sec. 1092—Noc

*AN ACT relating to Conveyances of Real Estate.*

SECTION 1. Any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, shall, in any conveyances of real estate so held, set forth the name in which he or she derived title to said real estate.

**Sec. 2.** All conveyances of real estate, except patents issued by the State as a party, made by any public officer pursuant to any law of this State, shall, when recorded by the County Recorder, be by him alphabetically indexed in the "Index of Grantors," both in the name of the officer making such sale, and in the name of the person owning the property so sold.

**Sec. 3.** It is hereby made the duty of all County Recorders to alphabetically index in the "Index of Grantors," both in the name by which title was acquired, and also the same by which the same was conveyed, all conveyances referred to in section one of this Act.

**Sec. 4.** This Act shall be in force from and after its passage. [Approved March 4, 1874.]

**1069.** Deeds are construed most strongly against the grantor. *Salmon v. Wilson*, 41 Cal. 595; *Piper v. True*, 36 Cal. 606.

**1072.** A deed which contains no words of inheritance conveys a fee simple title, but the title may be limited in the *habendum* clause to an estate for life. *Montgomery v. Sturdevant*, 41 Cal. 290.

**1092.** If the true owner conveys property by any name, the conveyance as between grantor and grantee conveys the title. *Fallon v. Kehoe*, 38 Cal. 44.

The grantee may be designated by the customary name at the time of the execution of the conveyance, no matter what might be his true name. *Garwood v. Hastings*, 38 Cal. 217.

**1106.** Deed in fee comes after acquired title, even when taken in the name of a party who has no real interest in the transaction. *Quivey v. Baker*, 37 Cal. 465.

A deed given by the holder of a Mexican grant before confirmation, vests in the grantee the legal title. *Walbridge v. Ellsworth*, 44 Cal. 353; *Vallejo L. Ass'n v. Viera*, Jan. T. 1874.

A quitclaim deed passes all the title which the grantor has, and will support ejectment. *Lawrence v. Ballou*, 37 Cal. 518; *Frey v. Clifford*, 44 Cal. 335; but does not carry after acquired title. *Quivey v. Baker*, 37 Cal. 465. A quitclaim deed executed by the grantee before he receives a patent from the United States, conveys the title, and the patent enures to the benefit of the purchaser. *Crane v. Salmon*, 41 Cal. 63.

This section held not to apply to Sheriff's deeds. *Kenyon v. Quinn*, 41 Cal. 330; *Emerson v. Sansome*, 41 Cal. 552.

**1110.** An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition.

Grant on  
condition  
precedent.

*Talbert v. Hopper*, 42 Cal. 399.





Boundary  
by highway,  
what pass-  
es.

1112. A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant.

1113. A covenant in a deed, whether express or implied by law, that the grantor has not sold or encumbered the land, is a personal covenant. *Lawrence v. Montgomery*, 37 Cal. 183.

Incumbran-  
ces, what  
include.

1114. The term "incumbrances" includes taxes, assessments, and all liens upon real property.

1135. No precise form of words is necessary in a bill of sale. *Myers v. Farquharson*, July T. 1873.

1141. Change of possession essential. *Regli v. McClure*, Jan. T. 1874.

1146. Deed of gift, notwithstanding money consideration. *Salmon v. Wilson*, 41 Cal. 595.

Revocation  
of gift in  
view of  
death.

1151. A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time; but when the gift has been delivered to the donee, the rights of a bona fide purchaser from the donee before the revocation, shall not be affected by the revocation.

1158. *Graff v. Middleton*, 43 Cal. 341.

Instru-  
ments to be  
acknowl-  
edged,  
except, etc.

1161. Before an instrument can be recorded, unless it belongs to the class provided for in either sections eleven hundred and fifty-nine, eleven hundred and sixty, twelve hundred and two, or twelve hundred and three, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its President or Secretary, or proved by a subscribing witness, or as provided in sections eleven hundred and ninety-eight and eleven hundred and ninety-nine, and the acknowledgment or proof certified in the manner prescribed by Article III of this Chapter.

**1163** of said Code is repealed.

**1165.** The Recorder must in all cases endorse the amount of his fee for recordation on the instrument recorded. [Approved March 11th, 1874. Sixty days.]

Fees of Recorder to be endorsed.

**1170.** An instrument is deemed to be recorded, when, being duly acknowledged or proved, and certified, it is deposited in the Recorder's office with the proper officer for record.

Instrument, when deemed recorded.

**1172.** See Appendix to Civil Code, Chapter 245 of Statutes of Twentieth Session.

**1183.** The proof or acknowledgment of an instrument may be made without the United States, before either :

Acknowledgment by whom taken without U S.

1. A Minister, Commissioner, or Charge d'Affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,

2. A Consul, Vice Consul, or Consular Agent of the United States, resident in the country where the proof or acknowledgment is made; or,

3. A Judge of a Court of record of the country where the proof or acknowledgment is made; or,

4. Commissioners appointed for such purposes by the Governor of the State, pursuant to special statutes; or,

5. A Notary Public.

A deputy clerk has authority to take acknowledgment of a declaration of homestead. *Emmal v. Webb*, 36 Cal. 197.

**1188.** An officer taking the acknowledgment of an instrument, must indorse thereon, or attach thereto, a certificate substantially in the forms hereinafter prescribed.

Certificate to be indorsed on acknowledgment.

**1191.** Acknowledgment by wife, where husband is a non-resident. *Salmon v. Wilson*, 41 Cal. 595. Of mortgage on wife's separate property. *Conn. L. Ins. Co. v. McCormick*, 45 Cal. 580. Statements necessary, in acknowledgment by married woman. *McLaren v. Benton*, 43 Cal. 467.

**1192.** *Talbert v. Stewart*, 39 Cal. 602.







Evidence of  
hand writ-  
ing must  
prove what.

**1199.** The evidence taken under the preceding section must satisfactorily prove to the officer the following facts :

1. The existence of one or more of the conditions mentioned therein ; and,

2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine ; and,

3. That the witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine ; and,

4. The place of residence of the witness.

Records,  
what notice  
deemed  
from.

**1207.** Any instrument affecting real property, which was, previous to the thirtieth day of January, one thousand eight hundred and seventy-three, copied into the proper book of record, kept in the office of any County Recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and incumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate ; but nothing herein shall be deemed to affect the rights of purchasers or incumbrancers previous to that date. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded, provided it be first shown that the original instrument was genuine.

Certified  
copies as  
evidence.

**1213.** Purchaser with constructive notice. *Mahoney v. Middleton*, 41 Cal. 41.

Applicable to Mortgages. *O. F. Savings Bank v. Banton*, Oct. T. 1873.

**1214.** Priority of conveyances and of recording deeds. *Mahoney v. Middleton*, 41 Cal. 41; *Frey v. Clifford*, 44 Cal. 335.

What constitutes a purchaser in good faith. *McLaren v. Benton*, 43 Cal. 468.

Applicable to mortgages. *O. F. Savings Bank v. Banton*, Oct. T. 1873.

**1215.** Applicable to mortgages. *O. F. Savings Bank v. Banton*, Oct. T. 1873.

**1217.** The Registry Act does not make an unrecorded deed void as against subsequent attaching creditors. *Plant v. Smythe*, 45 Cal. 161.

**1237.** The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this Title provided. Homestead,  
of what  
consists.

*Gregg v. Bostwick*, 33 Cal. 220, affirmed. *Mann v. Rogers*, 35 Cal. 316. It represents the dwelling house and necessary outhouses, and need not be in a compact form, and may be intersected by highways. It may be used as a place of business. *Estate of Delaney*, 37 Cal. 176. Actual residence essential. *Prescott v. Prescott*, 45 Cal. 58.

**1238.** If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or with the consent of the wife from her separate property. When the claimant is not married, but is the head of a family, within the meaning of section one thousand two hundred and sixty-one, the homestead may be selected from any of his or her property. From what  
may be  
selected.

Lands held in joint tenancy not subject to selection. *Cameto v. Dupuy*, Oct. T. 1873.

**1239.** The homestead cannot be selected from the separate property of the wife without her consent, shown by her making, or joining in making, the declaration of homestead. When selected from  
wife's separate estate.

**1240.** Homestead exempt from forced sale. *Deffeliz v. Pico*, July T. 1873; *Engelbrecht v. Shade*, Jan. T. 1874.

**1241.** The homestead is subject to execution or forced sale in satisfaction of judgments obtained: Subject to  
execution,  
when.

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises;

2. On debts secured by mechanics', laborers', or vendors' liens upon the premises;

3. On debts secured by mortgages upon the premises, executed and acknowledged by the husband, wife, or an unmarried claimant;





4. On debts secured by mortgages upon the premises, executed and recorded before the declaration of homestead was filed for record.

1242. The homestead can only be divested by the concurrent act of both husband and wife. *Barber v. Babel*, 36 Cal. 11; *Brooks v. Hyde*, 37 Cal. 366; *McLaughlin v. Hart*, Oct. T. 1873.

1243. The homestead may be abandoned by filing in the office where the declaration is filed a declaration of abandonment, duly executed. *Clements v. Stanton*, Oct. T. 1873.

Money  
resulting  
from execu-  
tion sale  
protected.

1257. The money paid to the claimant is entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the husband, which the law gives to the homestead.

Head of a  
family,  
defined.

1261. The phrase "head of a family," as used in this Title, includes within its meaning:

1. The husband, when the claimant is a married person;

2. Every person who has residing on the premises with him or her and under his or her care and maintenance, either:

(1.) His or her minor child, or the minor child of his or her deceased wife or husband;

(2.) A minor brother or sister, or the minor child of a deceased brother or sister;

(3.) A father, mother, grandfather, or grandmother;

(4.) The father, mother, grandfather or grandmother of a deceased husband or wife;

(5.) An unmarried sister, or any other of the relatives mentioned in this section who have attained the age of majority, and are unable to take care of or support themselves.

Mode of  
selection.

1262. In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

**1263.** The declaration of homestead must contain:

Declara-  
tion, what  
to contain.

1. A statement, showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

A declaration of homestead made by a married woman is valid, notwithstanding her husband never resided nor made his home on the premises. *Gambette v. Brock*, 41 Cal. 78.

**1265.** From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this Title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the Probate Court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this Title.

Homestead  
right, when  
it attaches.

Survivor-  
ship and  
succession.

**1266.** An unmarried woman, who has the care of her child, is permitted by the statute to select a homestead. *Ellis v. White*, Oct. T. 1873.

**1271** of said Code is repealed.

**1273.** A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be executed and proved in like manner as other wills.

Married  
woman may  
dispose of  
separate  
estate by  
will.







Who may  
take by will.

1275. A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, can not take under a will, unless expressly authorized by statute. Effect immediately. [Approved January 29th, 1874.]

Witness,  
who is devisee,  
rights of.

1283. If a witness, to whom any beneficial devise, legacy or gift, void by the preceding section, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will, and he may recover the same of the other devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

1284 of said Code is repealed.

Will made  
out of state.

1285. No will made out of this State is valid as a will in this State, unless executed according to the provisions of this Chapter.

1286 of said Code is repealed.

Requisites  
of valid  
nuncupative will.

1289. To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of one thousand dollars;

2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time to bear witness that such was his will, or to that effect;

3. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death; or the decedent must have been, at the time, in expectation of immediate death from an injury received the same day.

**1294** of said Code is repealed.

**1306.** Pearson v. Pearson, Oct. T. 1873.

**1307.** When the omission to provide for living children is not shown to be intentional. Bush v. Lindsey, 44 Cal. 121; Estate of Utz, 43 Cal. 201.

The omitted child takes the title by descent. Wilson's Exrs. v. Fosket, 6 Met. 405; Bancroft v. Ives, 3 Gray, 371; Bradley v. Bradley, 24 Mo. 312; Hargardine v. Pulte, 27 Mo. 423; Pearson v. Pearson, Oct. T. 1873.

**1308-9.** Pearson v. Pearson, Oct. T. 1873.

**1311.** A devise of all the testator's property, real and personal, includes the homestead. Etcheborne v. Auzeais, 45 Cal. 121.

**1312.** Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms devising, or in any other terms denoting the intent of the testator to devise all the real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease.

Will passes  
after  
acquired  
estates.

**1313.** No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death such devise or legacy, and each of them, shall be valid; *provided*, that no such devises or bequests shall collectively exceed one third of the estate of the testator leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devise, next of kin, or heirs, according to law. [Approved March 18th, 1874. Immediate effect.]

Restriction  
to power of  
devise to  
charitable  
uses.





1317. Express devise sufficient accuracy. *Bruck v. Tucker*, 42 Cal. 349. Devise of common property. *Estate of Silvey*, 42 Cal. 211.

Devise of  
residue,  
what passes

1332. A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will.

Same.

1333. A bequest of the residue of the testator's personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will.

Death of  
devisee or  
legatee,  
before  
testator.

1343. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section thirteen hundred and ten.

Property of  
intestate  
chargeable  
with debts.

1358. When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this Code and the Code of Civil Procedure.

Order of,  
resort to  
property for  
payment of  
debts.

1359. The property of a testator, except as otherwise specially provided for in this Code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts ;
2. Property not disposed of by the will ;
3. Property which is devised or bequeathed to a residuary legatee ;
4. Property which is not specifically devised or bequeathed ; and
5. All other property ratably. Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for.

**1360.** The property of a testator, except as otherwise specially provided in this Code and the Code of Civil Procedure, must be resorted to for the payment of legacies, in the following order:

Order of, resort to property for payment of legacies.

1. The property which is expressly appropriated by the will for the payment of the legacies ;

2. Property not disposed of by the will ;

3. Property which is devised or bequeathed to a residuary legatee ;

4. Property which is [not] specifically devised or bequeathed.

**1367.** A legacy, or a gift in contemplation, fear or peril of death, may be satisfied before death.

Satisfaction of legacy.

**1376.** The validity and interpretation of wills, wherever made, are governed, when relating to property within this State, by the law of this State.

Law governing validity and interpretation.

**1384.** The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the Probate Court, and to the possession of any administrator appointed by that Court, for the purposes of administration.

Succession to estates of intestate.

**1385** of said Code is repealed.

**1386.** When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this Code and the Code of Civil Procedure, subject to the payment of his debts, in the following manner:

Succession to, and distribution of property.

1. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one











Same.

or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living, and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation;

2. If the decedent leave no issue, and the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if he leave a mother also, she takes an equal share with the brothers and sisters. If decedent leave no issue, nor husband nor wife, the estate must go to his father;

3. If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if a mother survive, she takes an equal share with the brothers and sisters;

4. If the decedent leave no issue, nor husband, nor wife, nor father, and no brother nor sister is living at the time of his death, the estate goes to his mother, to the exclusion of the issue, if any, of deceased brothers or sisters;

5. If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife;

6. If the decedent leave no issue, nor husband, nor wife, and no father, nor mother, nor brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors, must be preferred to those claiming through an ancestor more remote; however;

7. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation;

8. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent, descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation;

9. If the decedent leave no husband, wife, or kindred, the estate escheats to the State, for the support of common schools.

1401. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

Community property, on death of wife.

1410. If the appropriator of water takes only a part of the stream, another may afterward appropriate the remainder. *Smith v. O'Hara*, 43 Cal. 371.





How created and enforced.

**1428.** An obligation arises either from; 1. The consent of the parties; or, 2, The operation of law.

An obligation arising from operation of law, may be enforced in the manner provided by law, or by civil action or proceeding.

**1437.** The obligations of the parties to an agreement for the sale of lands are mutual and dependent, and neither party can put the other in default, except by tendering a performance on his part. *Englander v. Rogers*, 41 Cal. 420; *Bohall v. Diller*, 41 Cal. 532; *Kelly v. Mack*, 45 Cal. 303.

**1473** Execution of deed, in pursuance of contract to sell land. *Morenhaut v. Barron*, 42 Cal. 595; *Snow v. Ferrea*, 45 Cal. 195.

Application of act by way of performance or extinctions of obligation.

**1479.** Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

1. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied;

2. If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him, both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of debtor;

3. . If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:



- (1.) Of interest due at the time of the performance ;
- (2.) Of principal due at that time ;
- (3.) Of the obligation earliest in date of maturity ;
- (4.) Of an obligation not secured by a lien or collateral undertaking ;
- (5.) Of an obligation secured by a lien or collateral undertaking.

Application of payments made on indebtedness. *Cardinell v. O'Dowd*, 43 Cal. 587.

Right of debtor to direct application. *Clarke v. Scott*, 45 Cal. 86.

Evidence of choice of debtor as to application of payments. *Clarke v. Scott*, 45 Cal. 86.

**1488.** An offer of performance must be made to the creditor, or to any one of two or more joint creditors, or to a person authorized by one or more of them to receive or collect what is due under the obligation, if such creditor or authorized person is present at the place where the offer may be made ; and, if not, wherever the creditor may be found.

Offer of performance to whom, and where to be made.

**1512.** If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.

Performance when prevented by creditor.

**1513** of said Code is repealed.

**1521.** An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.

Accord, what.

**1524.** Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing, for that purpose, though without any new consideration, extinguishes the obligation.

Part performance in satisfaction.





Novation,  
right to  
rescind  
contract of.

**1533.** When the obligation of a third person, or an order upon such person, is accepted in satisfaction, the creditor may rescind such acceptance if the debtor prevents such person from complying with the order, or from fulfilling the obligation; or if, at the time the obligation or order is received, such person is insolvent, and this fact is unknown to the creditor, or if, before the creditor can with reasonable diligence present the order to the person upon whom it is given, he becomes insolvent.

General  
release,  
not to ex-  
tend to  
certain  
claims.

**1542.** A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

**1598.** If part of an entire contract is void, it is void in toto. *Fuller v. Reed*, 38 Cal. 99; *Prost v. Moore*, 40 Cal. 347.

**1620.** An express contract must be proved by an ascertained agreement between the parties. *Smith v. Moynihan*, 44 Cal. 53.

**1621.** In an implied contract, the law will imply that the party did not make such an agreement as, under the circumstances disclosed, he ought in fairness to have made. *Smith v. Moynihan*, 44 Cal. 53.

What con-  
tracts must  
be in writ-  
ing.

**1624.** The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of this Code;

3. An agreement made upon consideration of marriage, other than a mutual promise to marry;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept or receive part of such

goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

*Moss v. Atkinson*, 44 Cal. 3; *Swift v. Swift*, July T. 1873; *Mayer v. Child*, Oct. T. 1873; *Rutenberg v. Main*, Jan. T. 1874; *McCarger v. Rood*, Oct. T. 1873.

1636. The object of construction of a contract is to ascertain the intention of the parties in entering into it. *Reedy v. Smith*, 42 Cal. 245; *Thompson v. McKay*, 41 Cal. 221.

1645. "Practicable" does not mean "within the range of human means." *Reedy v. Smith*, 42 Cal. 245.

1657. Whether time is of the essence of the contract, must be decided on the circumstances of the case. *Steele v. Branch*, 40 Cal. 4. A reasonable time allowed. *Vance v. Pena*, 41 Cal. 686; *Grey v. Tubbs*, 43 Cal. 359; *Vassault v. Edwards*, 43 Cal. 459; *Hearst v. Pujol*, 44 Cal. 230.

1658, 1669, and 1672 of said Code are repealed.

1661. Executory contract for sale of lands. *Vassault v. Edwards*, 43 Cal. 459.

1667. Sub. 2. When contract with attorney not against public policy. *Hoffman v. Vallejo*, 45 Cal. 564. Agreement against public policy. *Martin v. Wade*, 37 Cal. 168; *Miles v. Thorne*, 38 Cal. 335; *Packard v. Bird*, 40 Cal. 378; *Powell v. Maguire*, 43 Cal. 11. There is a distinction between contracts *malum in se* and those which are merely *malum prohibitum*. *Martin v. Wade*, 37 Cal. 168.





1673. A contract which provides that a party shall not engage in "any branch of the yeast powder business," is in restraint of trade, and void. *Callahan v. Donnelly*, 45 Cal. 152. A contract in restraint of trade, which is not by its terms limited as to territory, will not be supported. *Id.*

1689. A party is not entitled to a rescission of contract for false representations, unless he has been injured thereby. *Purdy v. Ballard*, 41 Cal. 444.

The rescission of a contract must be in toto. *Id.*

Alteration  
of verbal  
contract.

1697. A contract not in writing may be altered in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration.

Alteration  
of written  
contract.

1698. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.

Agreement  
to sell real  
property.

1731. An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property.

1732 of said Code is repealed.

Contract for  
sale of  
personal  
property.

1739. No sale of personal property, or agreement to buy or sell it for a price of two hundred dollars or more, is valid, unless:

1. The agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent; or,

2. The buyer accepts and receives part of the thing sold, or when it consists of a thing in action, part of the evidences thereof, or some of them; or,

3. The buyer, at the time of sale, pays a part of the price.

Contract void under statute of frauds. *Patten v. Hicks*, 43 Cal. 509.



**1741.** No agreement for the sale of real property, or of an interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized, in writing; but this does not abridge the power of any Court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof.

Contract for sale of real property.

Contract not within statute of frauds. *Price v. Sturgis*, 44 Cal. 591. Mutual promises take contract out of statute. *Murphy v. Rooney*, 45 Cal. 78.

**1765.** Warranty as to title. *Gross v. Kierski*, 41 Cal. 111.

**1767.** If the vendor, at the time of sale, affirms a fact as to the essential qualities of his goods, and the purchaser buys on the faith of such affirmation, it is an express warranty. *Polhemus v. Herman*, 45 Cal. 573.

**1774.** One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause.

Warranty, on sale of written instrument.

**1798.** When property is sold by auction, an entry made by the auctioneer, in his sale-book, at the time of the sale, specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer, binds both the parties in the same manner as if made by themselves.

Auctioneers memorandum of sale.

**1840.** The liability of a depositary for negligence can not exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth.

Limitation of liability of depositing for negligence.

**1914.** Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing.

Loan, presumed to be on interest.





Interest defined.

1915. Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money.

Legal interest

1917. Unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of ten per cent. per annum, after they become due on any instrument of writing, except a judgment, and on moneys lent or due on any settlement of accounts, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him. In the computation of interest for a period less than a year, three hundred and sixty days are deemed to constitute a year.

Computation.

Rate of interest. Clark v. Dunnam, July T. 1873; Atherton v. Fowler, July T. 1873.

A party cannot recover interest at a conventional rate, unless there is an agreement in writing. Goldsmith v. Sawyer, July T. 1873.

Interest on judgment.

1920. Interest is payable on judgments recovered in the courts of this State, at the rate of seven per cent. per annum, and no greater rate, but such interest must not be compounded in any manner or form.

Lessor to make dwelling-house fit for its purpose.

1941. The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine.)

When lessee may make repairs, etc.

1942. If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the costs of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

**1949.** Every tenant who receives notice of any proceeding to recover the real property occupied by him, or the possession thereof, must immediately inform his landlord of the same, and also deliver to the landlord the notice, if in writing, and is responsible to the landlord for all damages which he may sustain by reason of any omission to inform him of the notice, or to deliver it to him if in writing.

Tenant must deliver notice served on him.

**1959.** Liability of common carrier for loss or injury to freight, considered. *Oakland C. M. Co. v. Jennings*, July T. 1873.

**1981.** An employé must substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employé.

Employee, duty of.

**1984.** An employe is always bound to use such skill as he possesses, so far as the same is required, for the service specified.

Must use skill.

**1988.** An employe who has any business to transact on his own account, similar to that intrusted to him by his employer, must always give the latter the preference.

Preference to employers interests.

**2065** of said Code is repealed.

**2079.** Any person, other than the master, mate, or a seaman thereof, who rescues a ship, her appurtenances or cargo, from danger, is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has a lien for such claim, which is regulated by the Title on Liens; but no claim for salvage, as such, can accrue against any vessel, or her freight, or cargo, in favor of the owners, officers, or crew of another vessel belonging to the same owners; but the actual cost at the time of the services rendered by one such vessel to another, when in distress, are payable through a general average contribution on the property saved.

Salvage.





2096. As between a passenger and the common carrier, proof of occurrence of accident is *prima facie* proof of negligence of carrier. *Yeomans v. Contra Costa S. N. Co.*, 44 Cal. 72.

Obligations  
of carrier  
when  
freight not  
delivered.

2120. If, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it. If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped in the nearest Post Office.

Carrier,  
how exoner-  
ated from  
liability.

2121. If a consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver, or duly offered to fulfill the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, on account of the consignee, and giving notice thereof to him.

2122 of said Code is repealed.

2144. The lien of a carrier for freight is lost by voluntary surrender of possession. *O'Rourke v. O'Connor*, 39 Cal. 442.

Obligations  
of carrier of  
messages.

2161. A carrier of messages for reward, other than by telegraph, must deliver them at the place to which they are addressed, or to the person for whom they are intended. Such carrier, by telegraph, must deliver them at such place and to such person, provided the place of address, or the person for whom they are intended, is within a distance of two miles from the main office of the carrier in the city or town to which the messages are transmitted, and the carrier is not required, in making the delivery, to pay on his route toll or ferriage; but for any distance beyond one mile from such office, compensation may be charged for a messenger employed by the carrier.



**2162.** A carrier of messages for reward, must use great care and diligence in the transmission and delivery of messages.

Care and  
req  
uired.

**2168.** Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.

Common  
carrier,  
what.

**2172.** A common carrier must start at such time and place as he announces to the public, unless detained by accident or the elements, or in order to connect with carriers on other lines of travel.

Must start  
on time.

**2174.** The obligations of a common carrier can not be limited by general notice on his part, but may be limited by special contract.

Obligations  
how limit-  
ed.

**2176.** A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes, is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same.

Written  
contract  
carrier.

**2177.** A common carrier is not responsible for loss or miscarriage of a letter, or package having the form of a letter, containing money or notes, bills of exchange, or other papers of value, unless he be informed at the time of its receipt of the value of its contents.

When not  
liable for  
loss.





Luggage,  
how car-  
ried and  
delivered.

2183. A common carrier must deliver every passenger's luggage, whether within the prescribed weight or not, immediately upon the arrival of the passenger at his destination; and, unless the vehicle would be overcrowded or overloaded thereby, must carry it on the same vehicle by which he carries the passenger to whom it belonged, except that where luggage is transported by rail, it must be checked and carried in a regular baggage car; and whenever passengers neglect or refuse to have their luggage so checked and transported, it is carried at their risk.

2194. A common carrier is liable as an insurer against loss. *Bohannan v. Hammond*, 42 Cal. 227.

2195. When loss occurs, the burden of proof is upon the carrier, to show that it resulted from one or other of the accepted cases. *Id.*

Liability  
for delay.

2196. A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence.

2197. Liability for damages to cargo of vessel. *Bohannan v. Hammond*, 42 Cal. 227.

Limitation  
of liability  
without  
notice.

2200. A common carrier of gold, silver, platina, or precious stones, or of imitations thereof, in a manufactured or unmanufactured state; of timepieces of any description; of negotiable paper or other valuable writings; of pictures, glass or chinaware; of statuary, silk, or laces; or of plated ware of any kind, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt or the bill of lading.

Sale of  
perishable  
property for  
freightage.

2204. If, from any cause other than want of ordinary care and diligence on his part, a common carrier is unable to deliver perishable property transported by him, and collect his charges thereon, he may cause the property to be sold in open market, to satisfy his lien for freightage.

**2373.** The owner will be responsible on contracts of affreightment made by the master. *Oakland C. M. Co. v. Jennings*, July T. 1873.

**2375.** The master of a ship, during a voyage, is a general agent for each of the owners of the cargo, and has authority to do whatever they might do for the preservation of their respective interests, but he cannot sell or hypothecate the cargo, except in the cases mentioned in this Article. Authority of shipmaster.

**2377.** The master of a ship may hypothecate the ship, freightage and cargo, and sell part of the cargo, in the cases prescribed by the Chapters on Bottomery and Respondentia, and in no others, except that the master may also sell the cargo or any part of it, short of the port of destination, if found to be of such perishable nature, or in such damaged condition that if left on board or reshipped, it would be entirely lost, or would seriously endanger the interests of its owners. Power of shipmaster to hypothecate.

**2385.** The owner of a ship is bound to pay to the owner of her cargo the market value at the time of arrival of the ship at the port of her destination, of that portion of her cargo which has been sold to enable the master to pay the necessary repairs and supplies of the ship. Obligations of ship owner to owner of cargo.

**2395.** A joint contract to furnish materials and perform certain labor, which does not define the relations of the persons among themselves, nor show a community of interest in the profits or the losses, does not by legal intendment establish a partnership. *Smith v. Moy-nihan*, 44 Cal. 53.

**2411.** The obligations of copartners, *inter sese*, whatever may be their nature and extent, refer only to the conduct of the business in which the firm is engaged. *McKenzie v. Dickinson*, 43 Cal. 119.

**2417.** Effect of one of several partners retiring from the firm. *Ross v. Cornell*, 45 Cal. 133.

**2462.** A partner authorized to act in liquidation, may indorse, in the name of the firm, promissory notes, or other obligations held by the partnership, for the purpose of collecting the same, but he cannot create What partner may do in liquidation.





any new obligation in its name, or revive a debt against the firm, by an acknowledgment when an action thereon is barred under the provisions of the Code of Civil Procedure.

Partnership, under fictitious name.

2466. Except as otherwise provided in the next section, every partnership transacting business in this State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the Clerk of the county in which its principal place of business is situated, a certificate stating the names in full of all the members of such partnership and their places of residence, and publish the same once a week for four successive weeks, in a newspaper published in the county, if there be one; and if there be none in such county, then in a newspaper published in an adjoining county.

Foreign partnerships.

2467. A commercial or banking partnership, established and transacting business in a place without the United States, may, without filing the certificate, or making the publication prescribed in the last section, use in this State the partnership name used by it there, although it be fictitious, or do not show the names of the persons interested as partners in such business.

Certificate of partnership to be filed.

2468. The certificate filed with the Clerk, as provided in section twenty-four hundred and sixty-six, must be signed by the partners, and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property. Where the partnership is hereafter formed, the certificate must be filed, and the publication designated in that section must be made within one month after the formation of the partnership, or within one month from the time designated in the agreement of its members for the commencement of the partnership; where the partnership has been heretofore formed, the certificate must be filed, and the publication made within six months after the passage of this Act. Persons doing business as partners con-



trary to the provisions of this Article, shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any Court of this State, until they have first filed the certificate and made the publication herein required.

Disabilities on failure to file certificate.

**2469.** On every change in the members of a partnership transacting business in this State under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the cases mentioned in section twenty-four hundred and sixty-seven, a new certificate must be filed with the County Clerk, and a new publication made, as required by this Article on the formation of such partnership.

New certificate required on change of partners.

**2470.** Every County Clerk must keep a register of the names of firms and persons mentioned in the certificates filed with him, pursuant to this Article, entering in alphabetical order the name of every such partnership, and of each partner therein.

Register of firms to be kept by county clerk.

**2511.** Purchase of interest in mining partnership makes purchaser a partner. *Taylor v. Castle*, 42 Cal. 369.

Distinction between mining partnerships and ordinary partnerships. *Jones v. Clark*, 42 Cal. 181. Strict partnership in mines as distinguished from "mining partnership," so called. *Decker v. Howell*, 42 Cal. 637.

**2519.** A managing superintendent cannot bind a mining partnership, except upon such contracts as are usual and necessary, unless specially authorized. *Jones v. Clark*, 42 Cal. 181.

The rule is otherwise as to strict partnership in mine. *Decker v. Howell*, 42 Cal. 637.

**2548.** Insurance of treasure in hands of an express company shipped on vessels. *Wells v. Pacific Ins. Co.*, 44 Cal. 397.

**2558.** Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void.

Policy of insurance when void.





**2561.** Life insurance; what is a local disease. *Scoles v. Universal Life Ins. Co.*, 42 Cal. 525.

Right to  
rescind  
when  
exercised.

**2583.** Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract.

**2586.** Policies of insurance are written contracts, to be interpreted by the same rules which apply to other contracts, and to be enforced according to the intention of the parties. *Wells v. Pacific Ins. Co.*, 44 Cal. 397.

They are to be construed liberally in favor of insured. *Id.*

Warranty  
must be in  
policy.

**2605.** Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it.

Perform-  
ance ex-  
cused.

**2609.** When, before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, or performance becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy.

**2611.** Cancellation of policy for non-payment of the premium. *Bergson v. Builders' Ins. Co.*, 38 Cal. 541.

Return of  
premium.

**2617.** A person insured is entitled to a return of premium paid, as follows:

1. To the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against;

2. Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.

**2618.** If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned.

When re-  
turn not  
allowed.

**2629.** An insurer is not liable for a loss caused by the willful act of the insured ; but he is not exonerated by the negligence of the insured, or of his agents or others.

Exoneration  
of insurer.

**2633.** In case of loss upon an insurance against fire, an insurer is exonerated, if notice thereof be not given to him by some person insured, or entitled to the benefit of the insurance, without unnecessary delay.

Insurer  
exonerated  
by failure to  
give notice  
of loss.

When the policy provides that the loss shall be estimated when it accrues, and be paid sixty days after due notice and proof, the company is not bound to pay till sixty days after such notice and proof. *Doyle v. Phoenix Ins. Co.* 44 Cal. 264.

**2642.** In case of double insurance, the several insurers are liable to pay losses thereon as follows :

Double  
insurance.  
contribu-  
tion.

1. In fire insurance, each insurer must contribute ratably towards the loss, without regard to the dates of the several policies ;

2. In marine insurance, the liability of the several insurers for a total loss, whether actual or constructive, where the policies are not simultaneous, is in the order of the dates of the several policies : no liability attaching to a second or other subsequent policy except as to the excess of the loss over the amount of all previous policies on the same interest. If two or more policies bear date upon the same day, they are deemed to be simultaneous, and the liability of insurers on simultaneous policies, is to contribute ratably with each other. The insolvency of any of the insurers does not affect the proportionate liability of the other insurers. The liability of all insurers on the same marine interest for a partial or average loss, is to contribute ratably.





Warranty of  
seaworthi-  
ness.

**2681.** In every marine insurance upon a ship or freight, or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy.

Seaworthi-  
ness when  
must exist.

**2683.** An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except in the following cases :

1. When the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time ; and,

2. When the insurance is upon the cargo, which, by the terms of the policy or the description of the voyage, or the established custom of the trade, is to be transhipped at an intermediate port, the implied warranty is not complied with, unless each vessel upon which the cargo is shipped or transhipped, be seaworthy at the commencement of its particular voyage.

Insurance  
on cargo  
when voy-  
age broken  
up.

**2707.** When a ship is prevented, at an intermediate port, from completing the voyage, by the perils insured against, the master must make every exertion to procure, in the same or a contiguous port, another ship, for the purpose of conveying the cargo to its destination ; and the liability of a marine insurer thereon continues after they are thus reshipped.

**2710** of said Code is repealed.

Average  
loss.

**2711.** Where it has been agreed that an insurance upon a particular thing or class of things shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it become entirely worthless, but he is liable for his proportion of all general average loss assessed upon the thing insured.



**2712.** An insurance confined in terms to an actual total loss, does not cover a constructive total loss; but covers any loss which necessarily results in depriving the insured of the possession, at the port of destination, of the entire thing insured.

Insurance  
against  
total loss.

**2745.** Where a person insured by a contract of marine insurance has a demand against others for contribution, he may claim the whole loss from the insurer, subrogating him to his own right to contribution. But no such claim can be made upon the insurer after the separation of the interests liable to contribution, nor when the insured, having the right and opportunity to enforce contribution from others, has neglected or waived the exercise of that right.

Contribu-  
tion sub-  
rogation  
of insurer.

**2752** of said Code is repealed.

**2753.** Where the policy of fire insurance upon goods in a store prohibited the use of any burning fluid or chemical oils, and a subsequent clause expressly permitted the use of kerosene oils for lights in dwellings: Held, that the use of kerosene oil in the store rendered the policy null and void. *Andrews v. Pratt*, 44 Cal. 309.

**2773.** An agreement to indemnify a person against an act thereafter to be done, is void, if the act be known by such person at the time of doing it, to be unlawful.

Indemnity  
against  
future  
wrongful  
act void.

**2839.** Performance of the principal obligation, or an offer of such performance, duly made as provided in this Code, exonerates a surety.

Surety  
exonerated  
by perform-  
ance or offer  
of perform-  
ance.

**2913.** The voluntary restoration of property to its owner by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons subsequently acquiring a title to the property, or a lien thereon, in good faith, and for a good consideration.

Restoration  
of property  
extinguish-  
es lien.





**2920.** The existence of a debt, an obligation to pay money, is essential to the existence of a mortgage. *Henley v. Hotaling*, 41 Cal. 22.

Mortgage a mere security. *Jackson v. Lodge*, 36 Cal. 28; *Mack v. Welzlar*, 39 Cal. 247; *Carpentier v. Brenham*, 40 Cal. 221.

Transfer of  
interest  
when  
deemed a  
mortgage.

**2924.** Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge.

Deed as a mortgage. *Davenport v. Turpin*, 43 Cal. 597.

A trust deed of real estate, taken by a person who loans money to the owner, defeasible on payment of the debt, is something more than a mortgage. *Fuquay v. Stickney*, 41 Cal. 583.

Parties may buy lands in satisfaction of a debt, and contract to reconvey, upon the payment of a sum certain, without any intention that the transaction should create a mortgage. *Henley v. Hotaling*, 41 Cal. 22.

Conveyance to secure advances. *Purdy v. Bullard*, 41 Cal. 444.

**2925.** To convert an absolute deed into a mortgage, something more must be shown than a reservation of the right to repurchase. *Henley v. Hotaling*, 41 Cal. 22.

The test by which to determine whether the transaction is a mortgage or a defeasible sale, is the fact whether or not there is a subsisting, continuing debt from the grantor to the grantee. *Farmer v. Grose*, 42 Cal. 169.

When a deed with agreement to sell back is not a mortgage. *Page v. Vilhac*, 42 Cal. 75.

**2929.** Mortgagor cannot affect subsequent incumbrancer. *Wood v. Goodfellow*, 43 Cal. 187.

Subse-  
quently  
acquired  
title inures  
to mort-  
gagee.

**2930.** Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution.

Title acquired by mortgagor feeds his prior mortgage. *Christy v. Dana*, 42 Cal. 175.

Record of  
assignment  
of mortgage  
as notice.

**2934.** An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor.

**2935.** When the mortgage is executed as security for money due, or to become due, on a promissory note, bond, or other instrument, designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond, or other instrument.

When not  
notice to  
mortgagor.

**2936.** Assignment of an indebtedness transfers likewise the security. *Hurt v. Wilson*, 38 Cal. 263.

**2937** of said Code is repealed.

This section held to conflict with sections 1213, 1214, 1215, relating to TRANSFERS, to which this subject more properly belongs, and that the provisions of these sections must prevail. *Odd Fellows Savings Bank v. Banton*, Oct. T. 1873.

**2941.** When any mortgage has been satisfied, the mortgagee or his assignee must immediately, on demand of the mortgagor, execute and deliver to him a certificate of the discharge thereof, and must, at the expense of the mortgagor, acknowledge the execution thereof so as to entitle it to be recorded, or he must enter satisfaction, or cause satisfaction of such mortgage to be entered of record; and any mortgagee, or assignee of such mortgage, who refuses to execute and deliver to the mortgagor the certificate of discharge, and to acknowledge the execution thereof, or to enter satisfaction or cause satisfaction to be entered of the mortgage, as provided in this Chapter, is liable to the mortgagor, or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and also forfeit to him or them the sum of one hundred dollars.

Duty of  
mortgagee  
on satisfac-  
tion of  
mortgage.

**2949, 2951** of said Code are repealed.

**2952.** Mortgages of real property may be acknowledged or proved, certified and recorded in like manner and with like effect, as grants thereof.

Record of  
mortgages.

*Odd Fellows Savings Bank v. Banton*, Oct. T. 1873.





2956. Instrument construed to be a chattel mortgage. *Wright v. Ross*, 36 Cal. 414.

Demand of performance requisite before sale of pledge.

3001. Before property pledged can be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found.

3005. The question whether a sale of mining stock, made in the Board of Brokers, is a sale at public auction, such as a pledge is authorized to make, upon default being made by the pledgor, not decided. *Child v. Hugg*, 41 Cal., 519.

Rights of pledgee on sale of pledge.

3009. When property pledged is sold by order of the pledgor before the claim of the pledgee is due, the latter may retain out of the proceeds all that can possibly become due under his claim until it becomes due.

3095. A pass-book of a depositor in a bank is not a negotiable instrument. *Witte v. Vincenot*, 43 Cal. 325.

Place of payment not specified.

3100. A negotiable instrument which does not specify a place of payment, is payable at the residence or place of business of the maker, or wherever he may be found.

Implied warranty of indorser.

3116. Every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him:

1. That it is in all respects what it purports to be;
2. That he has a good title to it;
3. That the signatures of all prior parties are binding upon them;
4. That if the instrument is dishonored, the indorser will, upon notice thereof duly given to him, or without notice, where it is excused by law, pay the same with interest, unless exonerated under the provisions of sections thirty-one hundred and eighty-nine, thirty-two hundred and thirteen, thirty-two hundred and forty-eight, or thirty-two hundred and fifty-five.

Undertaking of holder on presenting check for payment. *Redington v. Woods*, 45 Cal. 406.



**3121** of said Code is repealed.

**3131.** Presentment of a negotiable instrument for payment, when necessary, must be made as follows, as nearly as by reasonable diligence it is practicable: Presentment, how made.

1st. The instrument must be presented by the holder;

2d. The instrument must be presented to the principal debtor, if he can be found at the place where presentment should be made; and if not, then it must be presented to some other person having charge thereof, or employed therein, if ~~one~~ one can be found there;

3d. An instrument which specifies a place for its payment, must be presented there; and if the place specified includes more than one house, then at the place of residence or business of the principal debtor, if it can be found therein;

4th. An instrument which does not specify a place for its payment, must be presented at the place of residence or business of the principal debtor, or wherever he may be found, at the option of the presentor; and,

5th. The instrument must be presented upon the day of its maturity, or, if it be payable on demand, it may be presented upon any day. It must be presented within reasonable hours; and, if it be payable at a banking house, within the usual banking hours of the vicinity, but, by the consent of the person to whom it should be presented, it may be presented at any hour of the day;

6th. If the principal debtor have no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for payment is excused.

**3132.** Consult generally *Simpson v. Pacific M. L. Ins. Co.*, 44 Cal. 139.





3165 of said Code is repealed.

Bill where payable.

3176. A bill of exchange is payable :

1st. At the place where, by its terms, it is made payable ; or,

2d. If it specify no place of payment, then at the place to which it is addressed ; or,

3d. If it be not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found.

If the drawee has no place of business, or residence [cannot] with reasonable diligence be ascertained, presentment for payment is excused, and the bill may be protested for non-payment.

Presentment for acceptance, how made.

3186. Presentment for acceptance must be made in the following manner, as nearly as by reasonable diligence it is practicable :

1st. The bill must be presented by the holder or his agent ;

2d. It must be presented on a business day, and within reasonable hours ;

3d. It must be presented to the drawee, or, if he be absent from his place of residence or business, to some person having charge thereof, or employed therein ; and,

4th. The drawee, on such presentment, may postpone his acceptance or refusal until the next day. If the drawee have no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for acceptance is excused, and the bill may be protested for non-acceptance.

What acceptance admits.

3199. The acceptance of a bill of exchange admits the signature of the drawer, but does not admit the signature of any indorser to be genuine.

3213. Whether a delay of nine days by the drawee, in demanding repayment of the holder, constitutes such laches on the part of the drawee as will defeat the action—query? (See facts.) *Redington v. Woods*, 45 Cal. 406.

3234. Subd. 4. Damages on foreign bills drawn or negotiated within this State. *Pratalougo v. Larco*, Jan. T. 1874.

3262 of said Code is repealed.

3288. Interest by way of damages. *Pujol v. McKinlay*, 42 Cal. 559.

3300. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things, would be likely to result therefrom.

Measure of damages on breach of contract.

Breach of contract to furnish freight. *Utter v. Chapman*, 43 Cal. 279. Contract to form partnership. *Powell v. Maguire*, 43 Cal. 11.

3336. The detriment caused by the wrongful conversion of personal property is presumed to be :

Conversion, measure of damages.

1st. The value of the property at the time of the conversion, with the interest from that time ; and,

2d. A fair compensation for the time and money properly expended in pursuit of the property.

The owner of personal property which has been wrongfully converted, is ordinarily entitled to recover his specific property or its value. *Atkins v. Gamble*, 42 Cal. 86.

Interest by way of damages. *Pujol v. McKinlay*, 42 Cal. 559.

3356. For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner.

Value of thing in action.

3380. Any person having the possession or control of a particular article of personal property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession.

Owner may recover specific property.

3384. Except as otherwise provided in this Article, the specific performance of an obligation may be compelled.

Specific performance, when compelled.

Consult generally *Steele v. Branch*, 40 Cal. 4; *Englander v. Rogers*, 41 Cal. 420; *Marshall v. Caldwell*, 41 Cal. 611; *Vance v. Pena*, 41 Cal. 686; *Grey v. Tubbs*, 43 Cal. 359; *Moss v. Atkinson*, 44 Cal. 3. Execu-





tory contract of sale of wife's separate property. *Love v. Watkins*, 40 Cal. 547. Parol contract for sale of land. *King v. Meyer*, 35 Cal. 646. Contract for execution of lease. *McCarger v. Rood*, Oct. T. 1873. Right defeated by delay. *Thorne v. Hammond*, Oct. T. 1873.

3387. Jurisdiction to decree specific performance does not turn at all upon the question whether the contract relates to real or to personal property, but whether the breach admits of adequate compensation in damages. *Senter v. Davis*, 38 Cal. 450.

3388. An executory contract can be enforced, if signed by the vendor alone. *Vassault v. Edwards*, 43 Cal. 459.

3385, 3393, 3453, 3454, 3455, 3456 of said Code are repealed.

3391. Subd. 3. The agreement must be one which in all its features appeals to the judicial discretion, as having been obtained without any intermixture of unfairness. *Bruck v. Tucker*, 42 Cal. 347.

3422. Consult generally *Cowell v. Martin*, 43 Cal. 605; *Logan v. Hale*, 42 Cal. 645; *Andrews v. Pratt*, 44 Cal. 309; *Moore v. Massini*, 43 Cal. 389.

Injunction,  
when not  
allowed.

3423. An injunction cannot be granted :

1st. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;

2d. To stay proceedings in a Court of the United States;

3d. To stay proceedings in another State upon a judgment of a Court of that State;

4th. To prevent the execution of a public statute, by officers of the law, for the public benefit;

5th. To prevent the breach of a contract, the performance of which would not be specifically enforced;

6th. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession ;

7th. To prevent a legislative act by a municipal corporation.



**3457.** An assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto, in the following cases: Assign-  
ment,  
when void.

1st. If it give a preference of one debt or class of debts over another;

2d. If it tend to coerce any creditor to release or compromise his demand;

3d. If it provide for the payment of any claim known to the assignor to be false or fraudulent, or for the payment of more upon any claim than is known to be justly due from the assignor;

4th. If it reserve any interest in the assigned property, or in any part thereof, to the assignor, or for his benefit, before all his existing debts are paid;

5th. If it confer upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust;

6th. If it exempt him from liability for neglect of duty or misconduct.

**3479.** Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance. Nuisance,  
what.

Subd. 3. The obstruction of a public highway is a common nuisance. *L. T. Co. v. S. & W. W. R. Co.*, 41 Cal. 562.

**3480.** A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Public  
nuisance.

**3484.** A party is not limited to his action to abate the nuisance, but may sue to recover damages. *Will v. Sinkwitz*, 41 Cal. 588.



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3932. Where the grantee sells the property, the grantor may affirm the sale and sue for the overplus, after payment of mortgage debt. *Wilbur v. Sanderson*, 43 Cal. 496.

All provisions of law inconsistent with the provisions of this Act are hereby repealed, but no rights acquired or proceedings taken under the provisions repealed, shall be impaired or in any manner affected by this repeal; and whenever a limitation or period of time is prescribed by such repealed provisions for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Act takes effect, and the same or any other limitation is prescribed by this Act, the time of limitation which shall have run when this Act takes effect shall be deemed part of the time prescribed by this Act.

With relation to the laws passed at the present session of the Legislature, this Act must be construed as though it had been passed at the first day of the present session, if the provisions of any law passed at the present session of the Legislature contravenes or is inconsistent with the provisions of this Act, the provisions of such law must prevail.

This Act shall take effect on the first day of July, one thousand eight hundred and seventy-four.

Approved March 30th, 1874.











